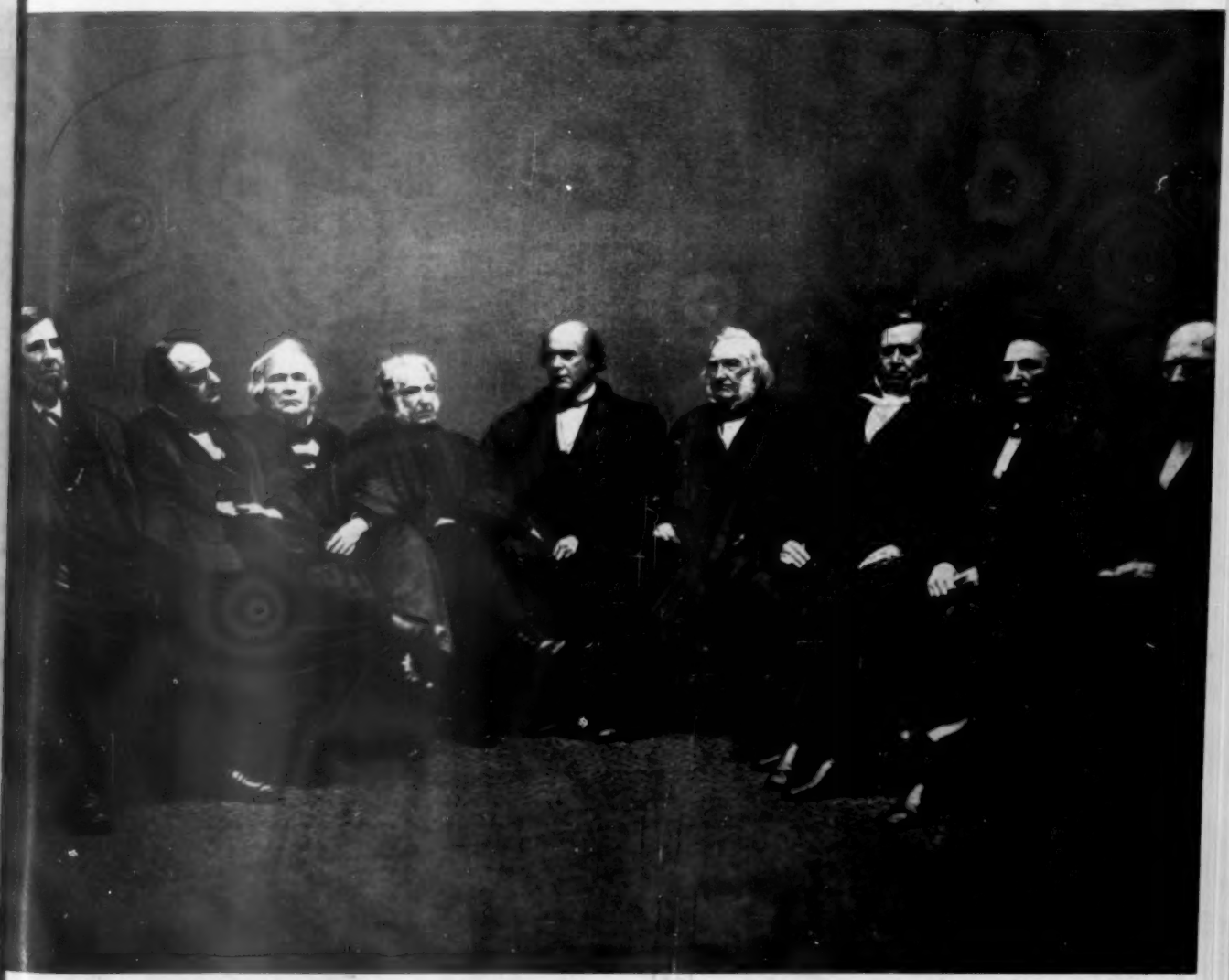
AMERICAN BAR ASSOCIATION JOVRNAL

EBRUARY 1941



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· 1865 ·

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THE TRAVELERS COMPANIES HARTFORD · CONNECTICUT

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In This Issue

Our Cover—The picture on our cover is believed to be the earliest photograph ever taken of the entire Supreme Court. Photographs of individual members of the Court exist which are earlier. The daguerrotype, the first successful method of portrait-photography, was not invented until 1839 and it is probable that it was not commercially applied in this country for some time thereafter. A search by the JOURNAL'S representative indicates this picture to be the first photograph of the assembled Court which was ever published. This fact is confirmed by the Hon. Thomas E. Waggaman, Marshal of the Supreme Court, who has spent many years collecting the most complete album of the Court to be found anywhere in the country. A companion picture to ours, evidently taken at the same time, appears in Volume 2, page 410, of Warren's "The Supreme Court in United States History," 2nd edition, where it carries the subscription, "The Supreme Court in 1865." In that picture however, the Justices are shown in civilian attire; sans robes.

The Seal of the Court—Our best information checked with the Handy Studios in Washington (who own many of the original glass negatives from which early pictures of the Court are taken) is that it was probably made in the studio of Brady, the Civil war photographer, and was the work of either Brady or his assistant, Gardner. THE JOURNAL takes pride in presenting this picture to the profession.

The seal of the Court on the cover is a photographic reproduction of a recent seal-impression on a certificate of admission to practice before the Court. It is interesting to know that the seal of the Supreme Court goes back to the very earliest times of the Court itself. "The Supreme Court, Its History and Centennial, 1891," by Hampton L. Carson, shows that the Supreme Court first met on February 1, 1790, in New York City, but no quorum was present that day. On February 2 the Court again met and was formally opened and organized. On February 3 the Court adopted an order by which it was declared that "the seal of the Court shall be the arms of the United States engraved on a piece of steel, the size of a dollar with the words in the margin, "the seal of the Supreme Court of the United States."

"Better Opinions—How?"—In his article on that topic, Chief Justice Robert G. Simmons of the Supreme Court of Nebraska, touches on a question of wide interest to the Bench and Bar of the entire country. It is frequently charged that the tendency of our American Courts to write overlong opinions has been a chief cause of the enormous *bulk* of our reports in this country. Certainly English opinions as reported are much shorter and generally more uniform in their style and design. This, however, is partly due to the different methods existing in the two countries. In England the reports of opinions are not *written* by the judges; the opinions are generally spoken orally and are reduced to written form by the Editor or Head of the official "Council on Law Reporting." Justice Simmons' article is unique in the methods he has used to get his facts and is written in a suggestive and stimulating fashion.

State Lines and Federal Encroachment—There are "two schools of thought" about the growing avalanche which the Federal Government has manifested for many decades, so far as the states are concerned. Some approve this change in the balance between the states and the union; others disapprove it. Walter F. Dodd's article in this issue discusses the factual side of this question and shows clearly that what we may *wish* about the controversy is relatively unimportant. The realistic approach is the more important one, if we are to chart correctly this field of the law. Mr. Dodd has been one of the JOURNAL'S oldest and most valued contributors.

Improving the Administration of Justice—If the JOURNAL (and indeed the ABA itself) could be said to have a hobby during recent years, it might well be claimed that improving the administration of justice would be it. Witness the thirty year effort of the leaders of the profession which culminated in the Federal Rules of Civil Procedure. The work of Judge Parker's Committee is everywhere recognized, even by persons outside the law.

Defense Articles—The JOURNAL, in this issue, carries the third of its current series of defense articles. Edmund Ruffin Beckwith is doing a fine job as chairman of the ABA Defense Committee. One of the outstanding accomplishments of the committee has been the preparation of the bulletin "A Manual of Law for Use by Advisory Boards for Registrants," the title page of which we reproduce in connection with Mr. Beckwith's article. It is believed that this is the first time in our national history that the work of a Bar Association committee has been adopted in toto by the federal government and incorporated in one of its official publications. The JOURNAL expects to continue this series of defense articles as a part of its plan to keep the profession informed on what might be called the law of national defense.

What Is Law Practice?—A question which is being widely discussed, both in and out of the profession is: "what *are* the things which come within the lawyer's special province?" But the boundary lines of law practice have always been like the boundary lines on a map of Europe; they shift with changing times and move back and forth through the years and generations. Walter T. Fisher, a well-known Chicago lawyer, discusses this question in an interesting way in this issue. He is chairman of a Chicago Bar Association committee which has been studying this and similar problems for many years. His father was Secretary of the Interior under President Taft.

Supreme Court Decisions—On three successive Mondays of January, important opinions were handed down. All of them are reviewed or summarized in this issue.

AMERICAN BAR ASSOCIATION
FEBRUARY 1941 JOVRNAL VOL. 27 NO. 2

CURRENT EVENTS

Massachusetts Judicial Council

THE 16th annual report of the Judicial Council of Massachusetts was filed January 13, with Governor Saltonstall. The report calls attention to the fact that the Judicial Council movement, which resulted largely from the recommendation of the Massachusetts Judicature Commission in 1920, has now spread throughout the country, so that more than half of the states have judicial councils for the continuous study of the judicial system and its methods of procedure.

In the present report, the Massachusetts Council discusses at length the District Court system with tables showing the work loads and relative cost to the public in the 72 District Courts throughout the Commonwealth.

In view of the fact that biennial sessions of the legislature have increased the delay in the possibilities of progress in matters of procedure by legislation, the Council emphasizes the importance of reviving the regulation of procedure by rules of court, as has been done in the Federal Courts and in a number of states.

A report is submitted at the request of the legislature on the subject of defamation by radio explaining the present uncertainties in the law and recommending legislation to provide that:

> "Whoever, by himself or by his agent, makes a statement by radio broadcast which if published in writing would be a libel, shall be deemed to have made and published a libel, and shall be civilly and criminally responsible therefor according to the same provisions of law, practice and procedure as in other proceedings for libel."

Bar Integration

The subject of a report, requested by the legislature in 1937 on the subject of the organization of the entire bar as a self-governing body, is again discussed at length in the light of experience in other states; and the recommendation renewed that a resolve be passed by the legislature as follows:

> "*Resolved*, in order to promote the public interest in the administration of justice, in the interpretation of the laws, and in the bar of the Commonwealth as a body of officers of the court, the Supreme Judicial Court is hereby requested to provide by rules, for the organization of all present and future members of the bar of this Commonwealth, as a self-governing body subject to the constitutional authority and rules of said court, to be known as the Bar of Massachusetts."

The report closes with statistical tables showing the work accomplished by the various courts throughout the state during the past year.

Soldiers' and Sailors' Civil Relief Act

The article on the Soldiers' and Sailors' Civil Relief Act of 1940, *in the January issue of the* JOURNAL, *brought the following letter from Col. Wigmore, which is "inserted in the record" and will be read with interest.*

Chicago
January 13, 1941

EDITOR of the JOURNAL:

In view of the special concern of our profession nowadays in the Soldiers' and Sailors' Civil Relief Act 1940, it may be of interest here to record briefly its history:

Barring certain improvements of detail, it is a literal copy of the Soldiers' and Sailors' Civil Relief Act of 1918. That Act was drafted as a bill in the office of the then Judge Advocate General,—General Enoch H. Crowder. All through the early summer of 1918 the complaints from recruits had been coming in that their business and domestic rights and liabilities had necessarily been left without any legal protection. At my instance General Crowder appointed a committee of three to draft a bill,—myself (then a major, judge advocate), Mansfield Ferry (a younger member of the New York Bar, later of counsel to the Alien Property Custodian; now, alas! passed on), and Samuel Rosenbaum (of the Philadelphia Bar, formerly draftsman to the American Judicature Society, now a high-placed broadcaster).

We had only the brief and simple acts of the Civil War period as models, and they were of little use. We took advice from various quarters; the most troublesome situations to deal with were the mortgages and conditional sales of personalty and the insurance policies, especial the fraternal ones, which carry no reserve. All through the hot Washington August we labored, providing for all the situations that we could think of.

In early September the bill was introduced in Senate and House. The House Committee zealously spent ten continuous days on the draft, produced a bill, and enacted it on October 2. The Senate took the House bill and callously allowed five months (!) to pass, while the men in service (there were 2,000,000 of them by Jan. 1) worried over their legal plight. Finally the Senate acted, and the bill became a law on March 8, 1918.

In the Illinois Law Review for February 1918 (Vol. XII, p. 449) our trio published an article which served as a sort of brief for the bill; and our prediction of its constitutionality as governing both Federal and State procedure fortunately came true.

JOHN H. WIGMORE,
Northwestern University
School of Law.

Registration of Aliens

WITHIN recent weeks there has been completed an event of historic importance in the United States. It is the registration with the Federal Government of all aliens in the country.

Preliminary returns indicate that the number may be about five million. This is a substantial increase of the estimate made at the time of the enactment of the Alien Registration law. At that time it was estimated that the country's alien population might run to about 3½ million. In the actual working of the law there have been large numbers of instances of surprising situations. Persons who have lived in the country for many years and in some cases have assumed that they were citizens have

found out upon investigation that they were still aliens.

The large number of aliens in the country is significant; and yet the number represents less than 4% of the population. The great majority of these aliens have lived in the country for many years and are as strongly nationalistic as if they were natives.

One interesting development is the fact that a very considerable number of aliens seem to be in this country illegally. According to Earl G. Harrison, Director of Registration, some 100,000 aliens have admitted that they are in this country without legal right. Several thousand are said to have confessed to have past criminal records. The Attorney General is given discretion by the act to permit illegal entrants to remain provided their conduct is such as to warrant that action. Altogether the alien registration was justified both as a defense measure and as a measure of protection to the aliens themselves. It should help to keep down demogogic appeals against aliens since the factual situation is now known and is not subject to the usual gross exaggerations. Finally the registration should assist in classifying aliens and in segregating the really small proportion of them who need watching.

Tax Clinic

THE Section of Taxation of the American Bar Association will sponsor a mid-winter Tax Clinic, similar to those held in Washington in recent years, at the Mayflower Hotel in Washington, D. C., on February 8th. A luncheon at 12:45 will be followed by speeches and an open forum discussion. While the program is not complete, it is tentatively planned to highlight the following subjects:

1. The economics of taxation; pay as you go or extremely heavy taxation as against a more moderate policy, and the economic repercussions of each.

2. The excess profits tax. Similarity and differences between the present tax and that imposed during the last war; the applicability of decisions under the prior act and a general discussion of some of the interesting and complicated questions involved.

3. The Attorney General's report upon procedure of administrative agencies, especially as applied to agencies dealing with Federal taxation.

PERCY W. PHILLIPS,
Chairman, Committee on Tax Clinic, ABA Section on Taxation.

OTTO HOLBEIN

Journal Advertising

WE are pleased to announce that Mr. Otto Holbein, a man with wide experience in periodical advertising both in New York City and in Chicago, has been appointed Advertising Manager of the JOURNAL, and will devote his full time to that work. During recent months we have had the benefit of expert advertising counsel from several capable sources. A complete survey of our advertising problems and needs has been made. The appointment of our new Advertising Manager is the culmination of that expert advice and that survey. With the addition of the services of Mr. Holbein, the new regime will accomplish much good for the JOURNAL and the Association.

It should be emphasized that the new advertising program has only one objective, namely to provide a better law journal. We need hardly suggest the close relationship between good advertising and a successful and live publication.

Another point we desire to emphasize is that the new advertising regime will not change or influence in any manner whatsoever the long established editorial policies of the JOURNAL. Its chief objective will continue to be a law journal for practicing lawyers.

Finally, we take this occasion to say that the cooperation of our readers in regard to JOURNAL advertising would be very helpful in the development of its advertising patronage and its greater success. Lawyers are the advisers of every business enterprise. Would it not be good advice to call attention to the fact that the use of the advertising columns of the official journal of the profession, read by more than thirty thousand subscribers, will prove to be a good business-getting investment?

Regional Conference at Boston

THE first regional conference of the current Association Year was held at the Parker House, Boston, Massachusetts, on January 15, 1941, with the Chairman of the Section of Bar Organization Activities, Mr. Burt J. Thompson, of Forest City, Iowa, presiding.

The conference was in furtherance of a very successful plan adopted two years ago of bringing together, in different sections of the country, the active leaders of State and Local Bar Associations, members of Association Committees, and members of the House of Delegates of the Association from that part of the country in which the conference takes place. The Boston meeting brought together for an exchange of views outstanding members of the profession from the First and Second Circuits, who participated in a program which, continued through morning and afternoon sessions, carefully prepared in advance by the Chairman of the Section of Bar Organization Activities.

Mr. Thompson, after calling the meeting to order, reviewed briefly the reasons for and the accomplishments of the regional conferences, and called upon a representative from each state participating in the meeting for a brief resumé of the activities of his own bar organization. Representatives from the states of Maine, Vermont, New Hampshire, Connecticut, Rhode Island, Massachusetts, and New York responded with a brief description of the methods by which each state carried on the affairs of its bar organization, which resulted in a lively exchange of views on the relative merits of the practices described.

Mr. Edwin M. Otterbourg, Chairman of the Committee on Unauthorized Practice of the Law, reviewed the work of that Committee in recent months, and answered many questions directed to him by those present who were interested in the subject and in the work the Committee is doing.

The remainder of the morning session was given over to discussion of administrative phases of bar associations, such as full-time secretaries, service rendered by bar association headquarters, bar publications, schools or institutes conducted for the benefit of members, library facilities, and the not new but always interesting subject of integration.

Mr. Reginald Heber Smith, of the Boston Bar, and a member of the Association's Committee on Legal Aid Work, responded to the agenda item of "Responsibility of the Bar in a Changing World" by presenting a

carefully prepared memorandum dealing with the duty of the bar, how it can be performed where there is and where there is not an adequate Legal Aid organization, the relation between the bar and the advisory boards which are dealing with the problems of draftees, and the needs which the current emergency has developed.

At a luncheon meeting, attended by all present for the regional conference, Mr. Arthur T. Vanderbilt, of the New Jersey Bar, was introduced by Mr. Philip J. Wickser, of Buffalo, a member of the Board of Governors from the Second Circuit. Mr. Vanderbilt described the program which has been gotten under way under the auspices of a new Special Committee of the Association on Improving the Administration of Justice, the Chairman of which is Hon. John J. Parker, Judge of the Fourth Circuit Court of Appeals. Mr. Vanderbilt pointed out that there was no single activity of the bar that would contribute more to the preservation of American institutions and to the maintenance of citizen morale than improvement in the administration of the courts so that controversies might be promptly and fairly disposed of.

At the afternoon session, Mr. Edmund Ruffin Beckwith, of New York City, Chairman of the Association's Special Committee on National Defense, delivered a carefully prepared address which reviewed the work of that Committee to date and referred to those things which the lawyers should be prepared to do as long as the present emergency exists. (Mr. Beckwith's paper appears at page 88 of this issue of the JOURNAL.)

The President of the Association, Mr. Lashly, then spoke briefly with respect to the fine work that had been carried on as a result of the regional conferences, and the many fields of endeavor now available to lawyers everywhere.

Mr. Frank W. Grinnell, Secretary of the Massachusetts Bar Association, offered the following resolution, which was unanimously adopted:

> "George Richards Grant, the member of the Board of Governors of the American Bar Association from the First Judicial Circuit, having joined in the call for this Regional Conference of Bar Executives died suddenly on December 28, 1940. A man filled with common sense, combined with a sense of public responsibility, he rendered valuable service to the bar, first, as State Delegate from Massachusetts, and then on the Board of Governors; and every man who knew him has lost a friend. The Regional Conference expresses its appreciation of the man and his work, and its sense of the loss to the organized bar in his untimely death."

The remainder of the afternoon session was given over to further discussion of bar integration, judicial selection, and the possibilities offered by the holding of legal institutes as a means of bringing to practicing lawyers the advantages of advanced legal education. These subjects, particularly judicial selection, elicited an interesting variety of views from those participating in the meeting, and furnished much "food for thought" to be taken back to State and Local Associations which were represented.

The State Chairmen and other active members of the Junior Bar Conference, in New England, had held separately an all-day conference with the national Chairman, Mr. Lewis F. Powell, Jr., of Richmond, Virginia, joining with the senior members at luncheon, and making a progress report at the close of the afternoon session.

In the evening, a dinner in honor of the President of the Association was tendered by the Massachusetts Bar Association, the Law Society of Massachusetts, and the Bar Association of the City of Boston, at the Somerset Hotel, at which all visitors were the guests of the host Associations, and at which interesting addresses were made by Mr. Charles M. Lyman, of Connecticut, and by President Lashly.

In addition to the speakers referred to above, the following persons were present at the meeting:

Connecticut

Joseph F. Berry, Hartford, State Delegate, Vice-Pres. Conn. State Bar Assn.; John L. Collins, Hartford, State Comm. on Improving Administration of Justice; James S. Coburn, Hartford, Dir. of Public Information for Conn. Junior Bar Conference; James W. Cooper, New Haven, Asst. Secy. & Treas. of State Bar Assn. of Conn.; George E. Hinman, Willimantic, State Comm. on Improving Administration of Justice; Hon. Wm. M. Maltbie, Hartford, Chm. State Comm. on Improving Administration of Justice; Samuel H. Platcow, New Haven, State Bar Comm. on Practice & Procedure, Pres. New Haven County Bar Assn.

Maine

Frank H. Haskell, Portland, State Bar Delegate, State Comm. on Improving Administration of Justice; Clement F. Robinson, Portland, State Delegate; Leon V. Walker, Portland, State Comm. on Improving Administration of Justice; George C. Webber, Auburn, State Comm. on Improving Administration of Justice.

Massachusetts

Horace E. Allen, Springfield, Treas. Massachusetts Bar Assn.; Talcott M. Banks, Jr., Boston, Chm. Comm. on Securities Laws and Regulations, Secy. Bar Assn. of City of Boston; Arthur E. Beaulieu, Fall River, Bristol County Bar Assn.; William M. Blatt, Boston, Delegate Mass. Law Society; Phillip Breen, Worcester, Secy. Worcester County Bar; Morris R. Bromell, New Bedford, Executive Committee Massachusetts Bar Assn.; John H. Cinamon, Boston, Editor, Law Society of Massachusetts; James N. Clark, Boston, Executive Committee Massachusetts Bar Assn.; Vincent P. Clarke, Boston, Secy. Bar Assn. of the County of Middlesex; Edward N. Dangel, Boston, Harold S. Davis, Boston, State Comm. on Improving Administration of Justice, Council Boston Bar Assn.; Maurice J. Dorgan, Lawrence, Pres. Lawrence Bar Assn.; Arthur L. Eno, Lowell, Pres. Law Society of Massachusetts; Frank W. Grinnell, Boston, Secy. Massachusetts Bar Assn.; Leslie P. Hemry, Boston, Council Junior Bar Conference; Sybil H. Holmes, Boston; Robert Holbrook Hopkins, Boston, State Comm. on Improving Administration of Justice, Richard E. Johnston, Boston, Comm. on Legislation and Laws, Law Society of Massachusetts; Vernon W. Marr, Boston; William A. O'Hearn, North Adams, Pres. Berkshire Bar Assn.; Charles Mitchell, New Bedford, Delegate New Bedford Bar Assn.; Willis A. Neal, Boston, Junior Bar Conference; Daniel Needham, Boston, Comm. on National Defense; J. T. Noonan, Boston; Henry Parkman, Jr., Boston, Council Boston Bar Assn.; Lispenard B. Phister, Boston, Executive Comm. Massachusetts Bar Assn.; Thomas F. Quinn, Boston, State Comm. on Improving Administration of Justice; Francis X. Reilly, Westboro, Pres. Worcester County Bar Assn.; Arthur E. Seagrave, Fall River, Pres. Fall River Bar Assn.; Anthony Oswald Shallna, Boston, Executive Comm. Law Society of Massachusetts; Romney Spring, Boston, House of Delegates, Director Massachusetts Bar Assn., J. N. Welch, Boston; Joseph Wiggin, Boston, Pres. Massachusetts Bar Assn.

New Hampshire

Oliver W. Branch, Manchester; Elwin L. Page, Concord; Robert W. Upton, Concord, Pres. New Hampshire Bar Assn.; Peter Woodbury, Manchester; Louis E. Wyman, State Delegate, Manchester.

New Jersey

L. Stanley Ford, Hackensack, Vice-Chairman Section of Bar Organization Activities, Dir. New Jersey State Bar, Vice-Pres. Bergen County Bar Assn.

New York

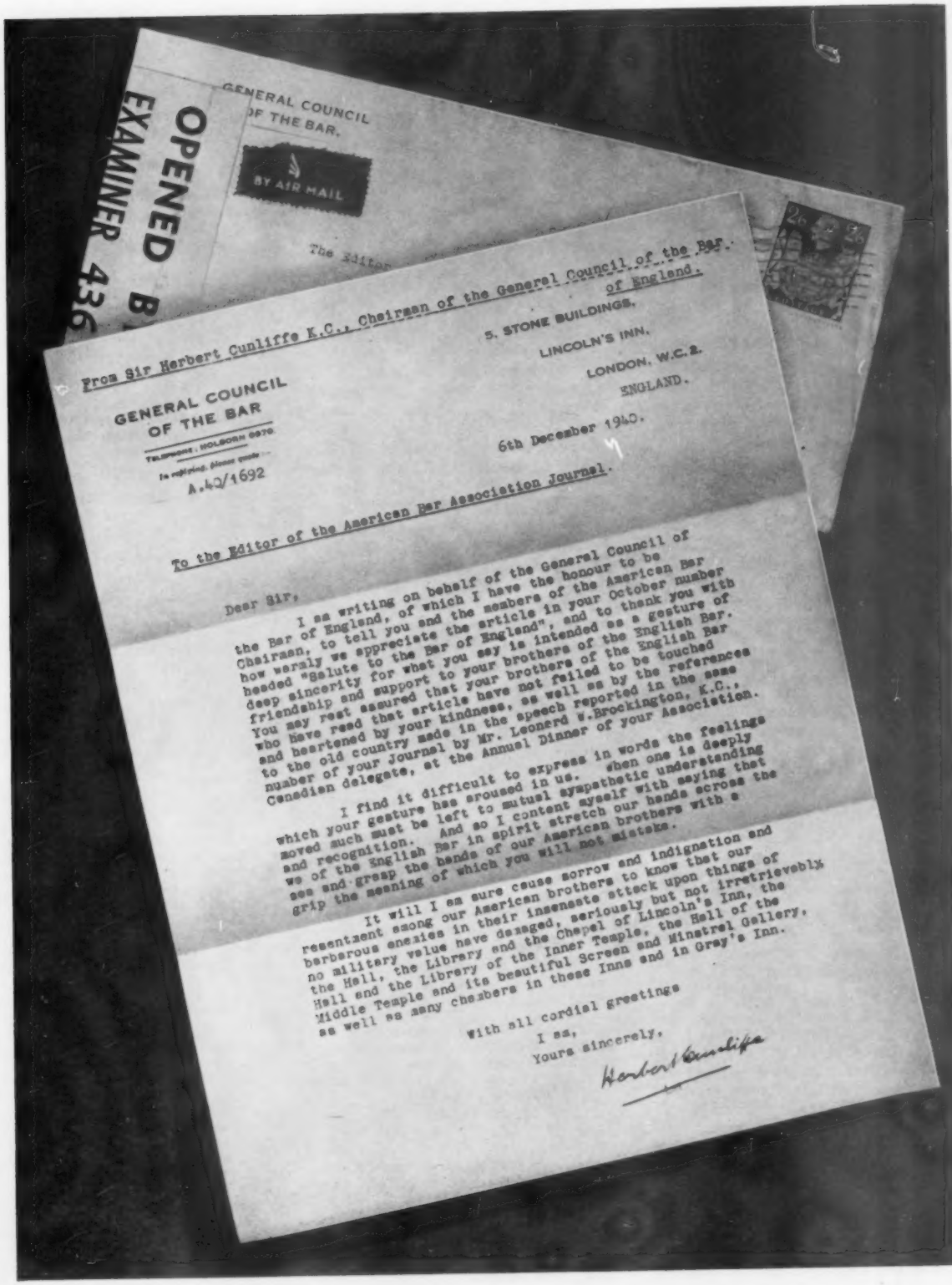
Emery A. Brownell, Rochester, Comm. on Legal Aid New York State Bar Assn., Secy. Natl. Assn. of Legal Aid Organizations; John Kirkland Clark, New York City, House of Delegates. Delegate Bar Assn. of the City of New York; Robert McC. March, New York City, Pres. New York County Lawyers Assn.; Terence J. McManus, New York City; Secy. New York County Lawyers Assn.; Edwin M. Otterbourg, New York City, Chm. Comm. on Unauthorized Practice of the Law; Thomas F. Thornton, New York City, Representing Queens County Bar Assn.; Philip J. Wickser, Buffalo, Board of Governors, Delegate Bar Assn. of Erie County.

Rhode Island

John W. Baker, Providence, Committee on American Bar Association; Elmer S. Chase, Providence, State Comm. on Improving Administration of Justice, Executive Committee R. I. Bar Assn.; Henry C. Hart, Providence, House of Delegates, Pres. R. I. State Bar Assn.; Francis I. McCanna, Providence, State Comm. on Improving Administration of Justice.

Vermont

Oscar C. Fitts, Brattleboro, State Bar Assn. Delegate; J. A. McNamara, Burlington, Vice-Pres. Vermont Bar Assn.; H. H. Powers, St. Albans, Pres. Vermont Bar Assn.



OPENED BY EXAMINER 436

GENERAL COUNCIL OF THE BAR.

BY AIR MAIL

The Editor

From Sir Herbert Cunliffe K.C., Chairman of the General Council of the Bar of England.

GENERAL COUNCIL OF THE BAR

TELEPHONE: HOLBORN 6070

In replying, please quote

A.42/1692

5, STONE BUILDINGS,
LINCOLN'S INN,
LONDON, W.C.2.
ENGLAND.

6th December 1940.

To the Editor of the American Bar Association Journal.

Dear Sir,

I am writing on behalf of the General Council of the Bar of England, of which I have the honour to be Chairman, to tell you and the members of the American Bar how warmly we appreciate the article in your October number headed "Salute to the Bar of England", and to thank you with deep sincerity for what you say is intended as a gesture of friendship and support to your brothers of the English Bar. You may rest assured that your brothers of the English Bar who have read that article have not failed to be touched and heartened by your kindness, as well as by the references to the old country made in the speech reported in the same number of your Journal by Mr. Leonard W.Brockington, K.C., Canadian delegate, at the Annual Dinner of your Association.

I find it difficult to express in words the feelings which your gesture has aroused in us. When one is deeply moved much must be left to mutual sympathetic understanding and recognition. And so I content myself with saying that we of the English Bar in spirit stretch our hands across the sea and grasp the hands of our American brothers with a grip the meaning of which you will not mistake.

It will I am sure cause sorrow and indignation and resentment among our American brothers to know that our barbarous enemies in their insensate attack upon things of no military value have damaged, seriously but not irretrievably the Hall, the Library and the Chapel of Lincoln's Inn, the Hall and the Library of the Inner Temple, the Hall of the Middle Temple and its beautiful Screen and Minstrel Gallery, as well as many chambers in these Inns and in Gray's Inn.

With all cordial greetings

I am,

Yours sincerely,

Herbert Cunliffe

IMPROVING THE ADMINISTRATION OF JUSTICE*

By Hon. John J. Parker
Judge, U. S. Circuit Court of Appeals, 4th Circuit

NO MORE important duty confronts the American lawyer than that of improving the administration of justice. The development of the law in all its branches is, of course, his concern; but he has already done a fairly good job in the development of the substantive law. This he has done because the substantive law arises out of the life of the people, and changing conditions of life are quickly mirrored in statutes and court decisions. The procedural or adjective law, however, dealing with the functioning of the courts, is the creation of more or less arbitrary rules or statutes; and change in this is dependent upon conscious effort on the part of courts and lawyers. Those who understand the existing system of procedural rules are inclined to be satisfied with it because anything seems simple to one who understands it, and any change involves effort and disturbance of habit; and those who do not understand it are generally lacking in the ability to suggest improvements. The result is that court procedure in most of our states has not kept pace with the progressive age in which we are living. Where technical common law procedure has been abandoned, codes of procedure have been overloaded with statutory rules, resulting generally in a procedure more complicated and cumbersome than that of the common law itself.

Improvements in Federal Courts

Forward looking lawyers have advocated for years that something should be done about court procedure; and in the federal jurisdiction they have finally succeeded in getting something done. Under the Rules of Procedure Act of 1934, the Supreme Court of the United States has proceeded to abolish the old distinction between actions at law and suits in equity, with all the complicated and useless learning that accompanied it, and has put into effect a simple and efficient Code of Procedure, which is beyond comparison the best procedure that the lawyers of the world have so far been able to achieve—a procedure so comprehensive that the most important litigation can be handled under it without difficulty and so simple withal that a mere novice at the law can master it in a few hours—a procedure that is expeditious as well as simple, that enables the court to reach at once the heart of any controversy before it and makes a trial what it should be, i. e. an effort to ascertain truth and administer justice, and not a mere game of skill between opposing counsel. Under the Administrative Office Act of 1939, the federal judiciary has been unified and judicial man power has been made available as needed; adequate supervision over administrative methods has been vested in judicial councils composed of the judges of the Circuit Courts of Appeals; provision has been made for obtaining information as to the functioning of the courts; and judicial conferences, in which bench and bar can discuss problems affecting the administration of justice and take action looking to the improvement of such administration, have been set up in every Circuit. Under the recent Criminal Rules Act, the Supreme Court has been given power to simplify the procedure in criminal prosecutions; and we have every reason to hope that the court will soon adopt a simple and efficient code of criminal procedure, which will expedite and improve the administration of the criminal law in the federal courts and will serve as a model for action by the states.

Importance of State Procedure

Important as are these reforms in federal procedure and administration, however, their attainment there is not to be compared in importance with attaining them in the several states of our Union. It is in the state courts that the great volume of our litigation is handled; it is by the state courts that most offenders against the laws must be punished; and it is from the functioning of the state courts, rather than of the federal courts, that the average citizen derives his ideas of the administration of justice. If, therefore, we lawyers wish to make the administration of justice in this country efficient—if we wish to demonstrate that, in this most important branch of government, the institutions of democracy are superior to those of the totalitarian powers—if, in short, we wish to do our part in upholding the free institutions of the country and in making democratic government so strong in the hearts of our people that it can withstand the attacks of foreign ideologies, it behooves us to set our house in order. We must restore respect for law by making its processes command respect from those who come in contact with them. We must make the administration of justice really efficient in those tribunals which affect most intimately the life of all the people.

Efforts of the American Bar Association

A movement to improve the administration of justice throughout the country was inaugurated by the American Bar Association three years ago during the presidency of Mr. Vanderbilt; and seven committees were set up in the Section of Judicial Administration charged with this responsibility. These were not ordinary committees. They were composed of experts and were headed by men nationally recognized as such in the field of procedural law. Chairman of the committee on court administration was Judge Edward R. Finch of the Court of Appeals of New York, who had served for years on the appellate division of the Supreme Court of that state. Chairman of the committee on evidence was Dean Wigmore of Northwestern University; of the committee on trial practice was Judge Chesnut, of Baltimore; of the committee on juries was Judge Dempsey of Cleveland; of the committee on pre-trial practice was Judge Moynihan of Detroit; of the committee on appellate practice was Prof. Sunderland of the University of Michigan; of the committee on administrative agencies and tribunals was Mr. Ralph Hoyt of Milwaukee. To each committee was added 49 advisory members, one from each state and the District of Columbia. The committees made comprehensive reports. They were not the ordinary theoretical reports of reformers but embodied the best thought of the country on the subject

*Address delivered at the Annual Meeting of the Nebraska State Bar Association, Omaha, Nebraska, December 28, 1940.

of procedural reform and crystallized into procedural standards the best practices of the various states. Our forty-eight states and the federal jurisdictions had served as laboratories, as it were, in which various procedural reforms had been tried out and found effective. Most of these reforms, however, had not extended beyond the jurisdictions in which they had been evolved; and the chief value of the work of the committees consisted, not in visualizing theoretical improvements, but in bringing together and presenting in one body of rules or standards the improvements in practice which had been tried and tested in American courts in different sections of the country.

The standards thus embodied in the reports of these committees were approved by the Section of Judicial Administration, the Assembly and the House of Delegates of the American Bar Association in 1938. Their adoption was made a special program of the Association in the following year, and many of them were adopted in different states as a result of that effort. This year, the effort is being renewed and committees have been set up in all of the states of the Union to advocate their adoption. What I seek to impress upon you today is that they are worthy of adoption in their entirety, not because of the character of the distinguished men by whom they were formulated, not because they are advocated by the American Bar Association and leaders of the profession throughout the country, but because they represent the minimum advance in judicial administration with which the people of any forward looking state should be content. In almost all of the states some of them are already in effect. The difficulty is to secure the adoption by a state of those which it does not already have, but which are just as important to a proper and efficient administration of justice as those that it does have. They may be summarized under five heads as follows: (1) Improvement in Judicial Organization; (2) Improvement in Administration of the Jury System; (3) Improvement in Procedure and Evidence; (4) Improvement in Practice of Administrative Agencies; (5) Improvement in Appellate Practice.

Judicial Organization

One of the first steps in achieving efficiency in judicial administration is to unify the courts under a competent administrative head, to the end that judicial man power may be assigned as needed to the relief of delay and congestion and that administrative practices may be properly supervised and regulated. The lack of any such unity and supervision is the outstanding characteristic of the courts of most of the states. To Supreme Courts or Courts of Appeals we have given power to review decisions of lower courts, but no power to control administrative practices, which may thwart justice and bring it into contempt quite as effectively as erroneous decisions. I do not advocate, of course, any supervision over the exercise of the essential judicial function vested in the judge; but if the judicial establishment is to function efficiently, there must be authority somewhere to assign judges to duty so that those with a light burden of work in their districts may help in districts where the burden is heavy, and to supervise such matters as the calling of dockets, the assignment of cases for hearing, the use of pre-trial practice, etc., and to direct judges to proceed with trials and render decisions in cases submitted. This is what the Administrative Office Act has done for the federal courts through the setting up of the judicial councils in each Circuit. Similar provision should be made for unifying the work of the judiciary of the states.

Vital in the matter of judicial organization is the creation of judicial conferences or councils. Such conferences serve a three-fold purpose: (1) they help unify the judiciary of the state by bringing the judges together for the discussion of common problems; (2) they provide for the discussion of these problems a forum which is in effect a school of jurisprudence for the judges; and (3) they crystallize the thought of the bench and bar with respect to proper standards of procedure and evolve practical solutions for difficulties facing the courts. In many of the states such councils or conferences are already provided by statute; but if the judiciary is properly alive to its responsibilities, no statute is really necessary for their creation. All that is necessary is that the Chief Justice of the state ask the other judges to confer with him for the purpose of improving the administration of justice and invite leaders of the bar and of the legal teaching profession to the conference. We had such a conference functioning effectively in our Circuit eight years before the passage by Congress of the Administrative Office Act. The Superior Court Judges of my state, without the aid of any statute, have set up such a conference which in the short space of two years has already done much to improve the administration of justice for the people of North Carolina.

Let me make two or three suggestions as to such a conference. In the first place all of the judges of courts of general jurisdiction and all the appellate court judges should be asked to attend. The Attorney General of the state, representatives of the bar to be designated by state or district bar associations and the deans or other representatives of law schools of good standing should be invited also. The program of each meeting should be carefully arranged and should be confined strictly to matters affecting the administration of justice, leaving alone substantive law and matters of general interest. You will be surprised to find how quickly such a conference will revolutionize the whole attitude of bench and bar towards the subject of procedural reform. And, in this connection, let me add one thought: The reform of procedure depends primarily upon the judges. The judicial conference will call the attention of the judges to reforms that are needed and will point out practical methods of attaining them.

With the judiciary of the state thus unified and organized, the next important step is to obtain legislation, where needed, vesting in the courts the power to regulate procedure by rule of court. That is where the regulation of court procedure belongs. The legislature has neither the time nor the experience to give proper attention to the matter. Legislation, not infrequently, is based upon occasional hardship observed by a legislator without any adequate appraisement of what would be the general effect of the rule enacted into law. Legislative rules, moreover, are rigid and difficult of amendment at the best. The judges, on the other hand, are engaged in the administration of justice as an everyday business. They know by actual and wide experience where the machinery of justice works smoothly and where it creaks and fails. They know when an injustice results from an unwise rule and when it results from a situation that no rule could remedy. If permitted to make the rules to govern the procedure of their courts, they will not only make them wisely and change them when they need changing, but they will also interpret them liberally in furtherance of justice.

Often do we see a court excuse an injustice resulting from a legislative rule of procedure with the argument that the legislature has so written the law; but seldom or never do we find a court permitting one of its own rules to stand in the way of substantial justice. The argument then is that the rule was never intended to be applied in such way as to result in injustice.

I might make an argument from constitutional principle and say that the rule making power belongs to the courts as a matter of constitutional right, since the separation of powers requires that the courts determine for themselves the manner in which the judicial function shall be exercised. Courts of high authority have so decided. There is high authority to the contrary, however, and the power of the legislature to regulate court procedure is so well established in many states that it would be futile to argue against it. I take my position, therefore, not on the ground of constitutional right, but on the more fundamental ground of inherent right, and say that wherever the right of regulation be vested under the state constitution, it rightfully belongs with the courts and that the legislature should vest it in the courts; for there can be no question as to the power of the legislature to thus delegate the details of rule making. Wherever this has been tried the results have been most gratifying. In no state where procedure is regulated by statute have I heard anything but criticism of the statutory procedure; and in no state where the rule making power has been conferred on the courts have I heard anything but praise of that system. Of course I need not argue for the system in the progressive state of Nebraska, since you have already adopted it and know as much about it as I do.

Improvement of Jury Trials

I am a firm believer in trial by jury. My experience on the bench and at the bar of more than thirty year convinces me that no better method of trying ordinary issues of fact, particularly in criminal cases, has ever been devised. But this is not all; no stronger bulwark, in my judgment, can be devised for protecting the innocent from oppression at the hands of the powerful. The jury system means that the people themselves sit in judgment when the state attempts to deprive an individual of life or liberty. To legislators they have delegated the making of laws. To the executive they have delegated enforcement. But the important matter of judging the guilt or innocence of a fellow citizen whose life or liberty is at stake, they have delegated to no one but have reserved to themselves, the jury not being elected or appointed, but chosen by lot from the body of the citizenship. The great importance of this in ordinary times is not readily appreciated; but when there is abuse of authority on the part of those in power, the value of this appeal to the conscience of the people is incalculable. History is replete with instances where political persecutions have failed because a jury of the people would not lend itself to tyranny, the case of John Peter Zenger, tried in New York in 1769, being an outstanding example.

There is now much criticism of the jury system, however; and if it is to be preserved, we must rid it of certain evils that have grown up in recent years and must make it operate more efficiently. In the first place we must get better jurors than are now being selected in many courts. Professional jurors who hang around courts and are called to service by bailiffs or deputy sheriffs—unemployed men who seek jury service for the small fee involved, who have little or no experience which would qualify them to pass upon the rights of their fellow men, and who not infrequently are prejudiced and biased—all too frequently make up the juries which are called to pass upon questions of the utmost importance. Wherever this situation exists it must be remedied. Jurors should be selected from the whole body of the citizenship, but the names only of those who are qualified by character and intelligence for jury service should be placed on the jury lists. Men of strict probity and high intelligence should be appointed by the courts as commissioners to make up the lists. Jurors should be chosen from the lists by lot, and, when chosen, they should be required to serve as a high civic duty. Terms of service should be arranged in such way as not to be a burden, and no man should be required or permitted to serve more than once in two years, and then for only a short period. The Cleveland system inaugurated by Judge Dempsey and adopted in a number of cities, shows what can be accomplished along this line even in the metropolitan centers. In rural communities provision for the appointment of jury commissioners by the courts and a determination on the part of the judges to rid the jury box of professional jurors would very largely solve the problem of personnel.

But there is an even more serious problem in connection with making the jury system efficient and that is to restore the function of the judge in jury trials. When adequately guided and directed by a judge, the jury is a most satisfactory agency for deciding questions of fact. Without such direction, a jury trial may well be a mere gamble. And yet in a large number of states, the function of the judge in jury trials has been practically destroyed. As recently pointed out by Judge Otis (21 J. Am. Jud. Soc. 105, 106) "that means that in 22 states the charge must be given *before* the arguments of counsel, that in 27 states the charge must be *written out and read* to the jury, that in 28 states the judge in the charge cannot even *state the issues and sum up the testimony*, that in 43 states he cannot *comment* upon the evidence or is otherwise restricted."

The judge who presides at a jury trial is the only disinterested lawyer connected with the proceedings. He is not only learned in the law, but he is skilled in weighing evidence and is not easily imposed upon by false logic or appeals to prejudice or emotion. He has no interest in the case except to see that justice is done; and to deprive him of the function, which was his at common law, of arraying the evidence before the jury and declaring and explaining the law applicable thereto is to invite miscarriages of justice. We give him the power to decide issues of fact in equity and admiralty causes, we give him the power to set aside a verdict if in his opinion it is contrary to the weight of the evidence or against good conscience. Why he should be forbidden to assist the jury in reaching a correct conclusion, which he will not have to set aside, is a matter which the profession will never be able to explain satisfactorily to any intelligent layman.

This does not mean, of course, that the judge should become an advocate. If he does he should be reversed. It means merely that he should be allowed to help the jury apply the law to the facts. As the evidence is received, he should, where occasion requires, point out to the jury the relevance of what is being received; and after the trial is concluded and the lawyers have had their say, he should, calmly and dispassionately, sum up the testimony and point out its bearing upon the issues that are being tried. As the jurors retire to

make up their verdict, what should be ringing in their ears is, not the impassioned pleas of counsel, but the dispassionate analysis of the judge. This is the way that jury trials are conducted in the courts of England and in the federal courts; and you do not hear complaint of miscarriages of justice in jury trials in either of these jurisdictions. It is in those states that have stripped the judge of the power to charge the jury as it existed at common law, that the failures of justice in jury trials occur. The practice of those states, as some one has said, is just as though we should put to sea with an experienced mariner as captain and a crew of twelve inexperienced seamen, and should forbid the captain to give any advice or assistance to the crew in the navigation of the vessel. Under such an arrangement it is not surprising that shipwreck should frequently result.

One cause of failure in jury trials results from burdening juries with matters that they are not qualified to determine. Cases involving complicated accounts, questions of boundary, etc., are much better decided by a judge or master who can have before him the books and documents upon which the rights of parties depend. In the complex conditions of modern life, such cases are becoming more and more numerous. We should provide for waiver of jury trial in such cases; and judges should not hesitate to assume the responsibility of decision, where the parties are willing to waive a jury. In states where this has been tried, trial by the judge without a jury has been found eminently satisfactory, and jury trial is asked only in those cases for which it is best suited. Where it is insisted upon in complicated cases, specific issues, directed to the precise questions involved, instead of the broad general issue, should be submitted to the jury. Even the best of juries with the best of assistance from the judge should not be expected to bear in mind all the rules of law applicable in a complicated case. They should make findings as to the ultimate matters of fact, and the judge, applying the law to their findings, should enter judgment accordingly.

Improvements in Trial Practice and Evidence

I shall touch but briefly on the improvements of trial procedure and the law of evidence. What I visualize with respect to procedure here is covered by the new federal rules. A simple statement of one's claim or defense, instead of complicated common law or code pleadings—in criminal pleading, a simple statement of the crime charged, with sufficient certainty to enable the prisoner to prepare his defense and protect against further prosecution—provision for discovery and for taking testimony either of witnesses or adverse parties in advance of trial—pre-trial hearings, at which the issues may be narrowed and simplified and unnecessary proofs dispensed with—elimination of necessity for exceptions—simplification of the rules of evidence with standard provisions for proof of documents and foreign laws and for the production of expert testimony—provision that admission or rejection of testimony shall rest largely in the discretion of the trial judge and not be ground for new trial in the absence of abuse of discretion or unless error has affected substantial rights of the parties—all of these are elementary and are essential to any program of procedural reform. They are covered by the reports of Judge Chesnut and Dean Wigmore contained in vol. 63 of the American Bar Association Reports and to a very large extent, they are embodied in the new federal rules. I have not the time to cover them adequately here.

There is one practical suggestion that I wish to make with respect to trial practice: and that is the desirability of having the federal rules adopted by the states. These rules were not formulated by federal judges for the peculiar practice of the federal courts. They were formulated by outstanding members of the American Bar as an ideal code of procedure. They represent the best thought of the country on that subject; and they are infinitely superior to the practice of any state, for they represent what is best in the practice of all the states. They are so simple that any lawyer can get a good working knowledge of them in a few hours study, and they furnish a *vade mecum* of procedural law, well indexed, which the busy lawyer can carry with him into court, and in which he can find in a moment's time the rule applicable to almost any procedural question that may confront him. They have been liberally construed by the federal courts, and any fear of pitfalls or technicalities in them has been found to be a mere delusion. They have already been adopted as the code of practice in a considerable number of states, and the lawyers of such states have a great advantage over others in that they are thus required to carry in mind only one system of practice for both state and federal courts. Furthermore, they at once find themselves familiar with the practice prevailing in an increasingly large number of the other states of the Union.

Courts ought not waste time on questions of practice; and my prediction is that when the federal rules are generally adopted, law practice will lose its technical character entirely and trials will become an inquiry into truth, in which the machinery of justice will operate so quietly and efficiently that it will be noticed no more than the running of the motor in a well equipped automobile. The purpose of a trial is to arrive at justice, and that purpose is largely frustrated if too much attention must be paid to the way in which the wheels go round.

There is another practical suggestion in connection with the federal rules. If you cannot succeed in having them adopted in their entirety, you can, at least, obtain the benefit of one of their most valuable features, and this without the benefit of a statute, if you can get the trial judges of your state interested. I refer to the pre-trial practice prescribed by Rule 16. Pre-trial practice simply means that in advance of trial, the trial judge goes over the case with counsel to find out what is in it and to simplify the issues. No statute or rule is needed to enable a judge to do this, and the judge who inaugurated the practice and brought it into vogue, Judge Moynihan of Detroit, had no statute to guide him. When the lawyers are called in, the judge has them state their contentions and what they expect to prove. The matter is conducted informally and it almost invariably appears that, as to a large number of matters, there is no dispute at all. Admissions as to these are dictated into the record. If amendment of the pleadings is needed, the amendments are made. The issues are formulated and are embodied in an order which is drawn up and signed by the judge, and the case is then ready for trial, unless the parties agree on a settlement, which they do in a large number of cases when they find what is really involved and what their adversaries are prepared to show. In Detroit, in Cleveland, in Boston, in Washington, in Richmond and in a number of other cities this practice has been tried with results which have been most satisfactory. Dockets have been cleared, trials have been shortened and the saving to litigants in time and money has been

beyond calculation. The practice is just as helpful in the rural districts, as experience in my Circuit has demonstrated. There is no excuse for its not being used successfully in any locality, if the judge, whether state or federal, is a man of sense and industry and the members of the bar show the cooperation that may reasonably be expected of them.

Administrative Agencies and Tribunals

One of the outstanding developments of recent years has been the growth in the executive departments of our governments, state and federal, of administrative agencies combining with their executive functions powers which are essentially legislative or judicial in character. There are more than a hundred and fifty such agencies in the federal government alone. Every state government has a large number of them for dealing with such matters as taxes, public utilities, insurance, securities, workmen's compensation, and social security. To my mind it is utterly futile to inveigh against the growth of these tribunals. That growth has been perfectly natural. Under the conditions of modern life it is absolutely necessary that the state regulate economic life. Laissez faire is gone. The conflict is not between laissez faire and regulation, but between regulation and some form of state socialism. If socialism is to be avoided, the state must regulate economic life. The courts cannot furnish this regulation. The legislature cannot furnish it. It can only be furnished by these administrative agencies combining, as they do, certain executive, judicial and legislative functions. And, if government is to exercise the control over economic life essential to the preservation of free enterprise, some such form of administrative agency is absolutely necessary to the proper and efficient exercise of governmental power. The problem is, not to prevent their growth, but to preserve in their processes the fundamental principles of freedom which have come down to us from the fathers.

I shall not deal in detail with the important problems which the proper development of administrative law presents to the lawyer of this country. Sufficient is it to say that the preservation of our free institutions as well as the justice and efficiency of our governmental processes depend upon the way in which he solves these problems. Committees of the American Bar Association and its Section of Judicial Administration, as well as of the Department of Justice, are at work upon them. But we need more than that. We need the sympathetic understanding and cooperation of lawyers throughout the country. And we must not be satisfied with a solution in the national field. Every state faces the same questions with respect to its administrative tribunals; and their solution within the states depends upon the local bars.

Appellate Practice

Nowhere is simplification of procedure more needed than in appellate practice. Appeals are necessary, not only that justice may be done individual litigants who feel that they have not received justice in the trial courts, but also to preserve uniformity of decision throughout the state. They should not involve undue expense and should be simply and expeditiously handled. Although this would seem to be obvious, the appellate practice of most jurisdictions is unbelievably complicated and expensive. Bills of exceptions, or formal statement of case on appeal, with perfectly useless assignments of error, must be specially prepared for presentation to the appellate court. In some jurisdictions, the testimony must be reduced to narrative form. In others, while the record as made below may be filed, a narrative statement must, in addition, be prepared and filed with the appellate court. In practically all, the record must be printed; and the parties must bear this needless expense, which may well be prohibitive of the appeal if the record is a large one.

The report of Prof. Sunderland's committee points the way to the elimination of this technicality and expense. We have adopted the practice recommended by that committee in our court in the Fourth Circuit; and I know, from experience extending over two years, that it works and works well. We hear appeals on the typewritten transcripts of records certified by the lower courts. No narration of record or statement of case is necessary. The points relied on are stated in the briefs, and counsel are permitted to print as appendices to their briefs such parts of the record as they desire the court to read. No agreement of counsel is required as to this. If counsel for appellant fails to print something to which counsel for appellee desires to call attention, the latter prints it as an appendix to his own brief. In this way the burden of narrating or agreeing upon the record is dispensed with, and the attention of the court is called to those parts of the testimony which are really material. If anything is overlooked, the entire record in typewritten form is before us and our attention can be called to it. The result is a great saving of expense to litigants and a great saving of time to the court. In 119 records before us during a given period, the expense of printing the entire record would have been approximately $69,000.00. The cost of the printing under our rule was only $23,000.00. The court was saved the reading of a great mass of wholly irrelevant and immaterial matter, and counsel were saved the burden of narrating the testimony or preparing a statement of the case. In addition to this, the court had the satisfaction of knowing that it was dealing with each case exactly as it was presented in the court below; and the necessity of selecting the material parts of the record, for printing in the appendices of the briefs, brought the minds of counsel to focus upon what was really important in the case. The arguments were better, the briefs were better and I believe that the decisions were better than under the old system; for all of us were getting away from technicalities and getting down to reality. I am glad to say that the same practice has been adopted in the Third Circuit and in the District of Columbia. It had already been adopted in a number of western and midwestern states. In my judgment it ought to be adopted in every jurisdiction.

Summary of Objectives

To sum up, I think that the procedure of the courts should be improved in the following respects: (1) that there should be better judicial organization, with provision for proper administrative control in the courts themselves of the judicial machinery, with the setting up of judicial councils and conferences and with the vesting in the courts of the rule making power for the regulation of procedure; (2) that trial by jury should be improved by the selection of better jurors through jury commissioners appointed by the courts, by restoring the common law power to the judge to aid and assist the jury, and by eliminating the general verdict in complicated cases; (3) that trial practice should be simplified after the pattern of the federal rules and that,

where possible, those rules should be adopted as the practice of the state, and that the rules of evidence should be simplified and the admissibility of evidence left largely in the discretion of the trial judge; (4) that the practice of administrative agencies and tribunals, with the method of reviewing their decisions, should be simplified with a view of preserving in their processes the principles of fair play and equal justice which are the heart of our free institutions; and (5) that the technicalities and burdens of appellate practice should be abolished with provision for review on the record made in the court below. Some of these objectives have been attained in most of the states. The objective of the committee of the American Bar Association is to see that all of them, or as many as possible, are obtained in all of the states.

I conclude with two thoughts. The first is that, if the lawyer wishes to preserve his place in the business life of the country, he must improve the administration of justice in which he plays so important a part and bring it into harmony with that life. If he imagines that the present functioning of the courts is satisfactory to the people, he is simply deluding himself. Workmen's compensation commissions were established very largely because the courts were not handling efficiently the claims arising out of industrial accidents and it was felt that they would not administer the compensation acts as efficiently as administrative bodies. Business corporations are willing, as all of us know, to suffer almost any sort of injustice rather than face the expense, the delay and the uncertainties of litigation. Arbitration agreements are inserted in contracts with ever-increasing frequency; and every such agreement is an implied affirmation of the belief that lay agencies for attaining justice are more efficient than the courts. Let me remind you that the administration of justice is the business of the lawyer as well as of the courts, and that if he does not wish to see his business slip away from him, it behooves him to go about it in an efficient and businesslike way.

But there is a higher ground upon which I would base my appeal. If democracy is to live, democracy must be made efficient; for the survival of the fit is as much a law of political economy as it is of the life of the jungle. If we would preserve free government in America, we must make free government, good government. Nowhere does government touch the life of the people more intimately than in the administration of justice; and nowhere is it more important that the governing process be shot through with efficiency and with common sense. We lawyers must help in every way that we can to meet the force of totalitarian states and to refute the slavish philosophy on which they are founded; but nothing else that we can possibly do or say is so important as the way in which we administer justice. The courts are the one institution of democracy which has been intrusted in a peculiar way to our keeping.

Notice By the Board of Elections

The following states will elect a State Delegate for a three-year term in 1941: Alabama; California; Florida; Hawaii; Kansas; Kentucky; Massachusetts; Missouri; New Mexico; North Carolina; North Dakota; Pennsylvania; Tennessee; Vermont; Virginia; Wisconsin; Territorial Group (Alaska, Canal Zone, Philippine Islands).

The following state will elect a State Delegate to fill a vacancy for the term to expire at the adjournment of the 1942 Annual Meeting: Illinois.

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1941 Annual Meeting: Massachusetts; New Mexico; North Dakota; Tennessee; Vermont; Territorial Group.

Any additional vacancies which may occur prior to February 15, 1941, will also be filled at the general election.

Nominating petitions for all State Delegates to be elected in 1941 must be filed with the Board of Elections not later than May 1, 1941. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on May 1, 1941.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1941 Annual Meeting of the Association, which will be held the week of September 29th.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition. While there is no restriction on the maximum number of names which may be signed to a nominating petition, in the interest of conserving space in the Journal the Board of Elections suggests that not more than fifty names be secured.

Nominating petitions will be published in the next-succeeding issue of the American Bar Association Journal which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the Journal. In view of the fact that the time for filing petitions expires on May 1, which normally would be the date on which the May issue of the Journal would be mailed, it is recommended that as far as possible nominating petitions be mailed in time to be received at the headquarters' office on or before April 15, 1941.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

EDWARD T. FAIRCHILD, Chairman.

COMPARATIVE LAW IN LATIN-AMERICA

By Bartholomew Landheer
Foreign Law Section, Law Library of Congress

EVEN an optimist could not be very hopeful about the prospects of comparative law under the present world conditions. Comparative law has always the academic value of making us acquainted with other systems of law as a means of arriving at a better understanding of our own legal institutions. Beyond this goal, however, comparative law in recent years has assumed the task of striving for unification of law by analyzing the ultimate legal principles of legal systems and stressing their similarity. Whether this tendency has been undermined or, on the contrary, strengthened by the world upheaval remains to be seen. The totalitarian philosophies deny the fundamental principle of our legal thinking, namely, that law is derived from the consensus of equal individuals or sovereign states. They interpret law as the product of individual volition, imposed upon the wills of other individuals without even the formal requirement [at least] of a fictitious consent.

This gap might seem difficult to overcome but we must not forget that there may be an "ideological surplus" in both trends of thought. The traditional view contains a certain element of idealism which it has tried to adjust to reality by placing the necessary consensus safely in a distant or imagined past while the totalitarian theory cannot deny that law, as an expression of the will of the state, must meet certain formal and material requirements if it is to fulfill its social function in a proper way.

Only a sociological interpretation of legal phenomena can find the common denominator for these contrary trends and currents. Thus, if the prospects for comparative law are none too cheerful from a positivist point of view, they may look considerably better if they express the philosophical or sociological instead of the practical aim of comparative law. The task of interpreting legal systems as social phenomena has become more important than ever before, and it falls to comparative law to pursue these aims in the field of foreign law and to lay the groundwork for a constructive legal philosophy, as well as for a unification of statutes inasfar as the latter goal is still practically possible. In this last respect the Americas are in the happy position of a certain permanency of their legal institutions which is an essential condition for any fertile work in this field.

The cultural task of interpreting the upheavals in our legal thinking "sub specie aeternitatis" undoubtedly falls to those parts of the world where distance gives a none too certain promise of objectivity and safety. It is a matter for thought among our legal profession, however, that more activity in this field can be recorded in Latin than in North America. While comparative law has been given a polite reception in many countries, it is especially in South America that it has found active cooperation. Alberto M. Justo the well-known Argentine jurist outlines Latin-American activities in this field in his recent pamphlet "Perspectivas de un Programa de Derecho Comparado", El Ateneo, Buenos Aires, 1940. Dr. Justo points out that the initiative of Edouard Lambert has found a most enthusiastic reception in South America. His famous Institute of Comparative Law in Lyon was given support by a section in Montevideo under Armand Ugon y Couture, a Chilean section in Santiago under Dean Alessandri Rodriguez while in Paraguay, Professor Luís de Gasperi has made efforts in the same direction. The Pan American Union has promised its support to these endeavors.

The institutes of "Derecho Comparado Hispano-Portuguís-Americano" in Madrid and of "Derecho y Legislación Comparado" in Mexico even preceded Lambert's institution.

In 1939 these efforts were followed by the creation of a "Instituto de Derecho Comparado" in the law faculty of the University of Cordoba in the Argentine Republic. In an article in "La Ley" of September 2, 1939, Dr. Alberto M. Justo pointed out that an institute of comparative law in the Argentine can do productive work in the field of private law through the far-reaching connections between the Latin-American legal systems, and in the field of constitutional law by tracing the influence of the United States.

The main objectives of the new Institute are: to promote relations with other comparative law institutes; to collect material concerning the preparation, discussion and sanction of national and foreign laws and codes; to promote the knowledge of the legislation and jurisprudence of the various countries; to translate foreign laws; to create a comparative law library; to organize periodical public meetings; to publish suitable material in a section of the "Boletin de la Facultad."

Judge Justo points out in his pamphlet "Perspectivas de un Programa de derecho comparado," that the mere enumeration of foreign laws does not mean comparative law. He quotes Edouard Lambert's opinion that law has a sociological basis of a specifically human content.

This sociological jurisprudence realizes the necessity of adapting law to changing economic and social conditions. It is the function of modern comparative law to brace the realization of these objectives, through the creative legal organs as the old-fashioned type of mechanical jurisprudence completely ignored its function as a progressive social science.[1]

There is undoubtedly a great future for comparative law if it is understood in this modern way which opens larger perspective than the legalistic comparison of statutes and cases—a collaboration in this respect between the United States and Latin-America might yield results, in spite of the differences between common and civil law. The Comparative and Foreign Law Section of the Bar Association may find a fertile field of collaboration in Latin-America.

In Latin-America the idealism, which is necessary for a reconstruction of one shattered civilization, seem to have survived. "Although we do not wish to create a unilateral conception of law, it is indispensable in this period of international confusion, to strive for a mutual interpenetration of the legal systems of the Americas in order to direct the legislative reconstruction toward a judicial order without borderlines. Only in this way it will be possible to replace the old legal mechanics by a progressive social science and to create a juridical inter-American conscience." (Dr. Justo in the preface to his pamphlet.)

[1]Quoted by Justo from Tabbah, D.: "Entre les deux pôles—historique et sociologique—de la philosophie contemporaine du droit", en "recueil Lambert", vol. 1, p. 25 *et seq.*

THE DECREASING IMPORTANCE OF STATE LINES

By Walter F. Dodd
of the Chicago Bar

IN THE actual operation of a written constitution, judicially construed, certain essential elements present themselves; (1) the text of the rule established by the words of the constitution; (2) the changing facts to which such rule applies; and (3) the judicial construction of the rule, which is affected both by the changing facts, and by the changing attitude of the court itself. Though the text remains the same and even though its judicial construction should remain unchanged, the rule changes by virtue of its application to new facts; and these new facts promote changes in the judicial attitude as well. Law is a body of rules for the government of human life, and must adjust itself to the changing needs of that life. This statement applies most strongly to our written constitution, within the terms of which adjustments must be made by legislation to new human needs.

The most important tendencies in the adjustment of government to modern social, industrial and economic needs are; (1) greater governmental regulation of industry and of individual action; (2) as an incident to such regulation, a wider delegation of power to administrative agencies in framing and applying such regulations, and (3) the increase of administrative adjudication in the application and enforcement of such regulations. Two basic questions arise with respect to this development of governmental regulation through administrative agencies; first, the respective regulative powers of the two governments—nation and state—exercising authority over the same territory; and second, the relations between the two governments in the exercise of their respective powers.

Constitutional Limitations

The constitutional limitations upon the powers of both state and nation are two-fold. The national government may exercise only the powers granted to it, and must exercise them within the limitations imposed upon it in respect to private rights. The state may exercise only its reserved powers, together with such concurrent powers as are permitted by the constitution and by federal inaction in the fields of concurrent power; and the exercise of state powers is subject to both state and federal constitutional limitations in respect to private rights.

Our constitutional law is still based in part on the theory that the national government is a government of restricted powers, and that a strict construction applies against federal powers as contrasted with a liberal construction of state powers. But the theory does not agree with the facts. State constitutional restrictions upon state powers are not liberally construed, and the powers granted to the national government are not strictly construed. In some respects the national constitution imposes more severe restrictions upon the states that upon the national government. "The Fifth Amendment, unlike the Fourteenth, has no equal protection clause" and "there is no requirement of uniformity in connection with the commerce power."[1] Moreover, where the national constitution imposes restrictions upon the state and national government in identical terms, the restriction upon national power will be the more liberally construed, so as not to defeat a co-equal power conferred upon the national government. This is expressed in the statement that "the constitution does not conflict with itself by conferring, on the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause."[2]

The judicial construction of "due process of law" and of other limitations upon governmental power has, with general approval, protected political and social rights,[3] and the right to a fair hearing or fair trial in judicial and administrative proceedings;[4] and with respect to governmental power of regulation—both state and national—such limitations have in recent years been liberally construed as to mortgage moratoria;[5] farm mortgages;[6] control of the price of milk[7] and of coal;[8] control of bargaining relations between employer and employee;[9] minimum wage;[10] unemployment compensation;[11] control of marketing quotas of agricultural products;[12] and other matters.[13]

State or Nation, Which Is to Act?

The regulatory powers of both state and nation have been broadly sustained by the courts; and substantially the only restriction upon the scope of state regulatory power is that which may be imposed by the exercise of a superior regulatory power of the national government. While sustaining this broad regulatory power, the courts have at the same time sustained the broad delegation of authority and the use of administrative adjudication, which are necessary to the exercise of

1. Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940), quoting Currin v. Wallace, 306 U. S. 1 (1939).

2. Brushaber v. Union Pacific R. Co., 240 U. S. 1, 24 (1916). See also Norman v. Baltimore & Ohio R. Co., 294 U. S. 240 (1935). This subject is more fully dealt with by the present author, in *Implied Powers and Implied Limitations in Constitutional Law*, 29 Yale Law Journal, 137 (1919).

3. Schneider v. Irvington, 308 U. S. 147; Thornhill v. Alabama, 310 U. S. 88; and Cantwell v. Connecticut, 310 U. S. 296, present a good record of the 1939 term of the United States Supreme Court with respect to freedom of speech and of the press; but, with respect to religious freedom, this record is somewhat marred by the political expediency reflected in Minersville School District v. Gobitis, 310 U. S. 586.

4. Morgan v. United States, 304 U. S. 1 (1938); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

5. Home Building & Loan Association v. Blaisdell, 290 U. S. 398 (1934).

6. Wright v. Vinton Branch of Mountain Trust Bank, 300 U. S. 440 (1937).

7. Nebbia v. New York, 291 U. S. 502 (1938); United States v. Rock Royal Co-operative, 307 U. S. 533 (1939).

8. Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940).

9. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1 (1937).

10. West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

11. Steward Machine Co. v. Davis, 301 U. S. 548 (1937). For old age pensions see Helvering v. Davis, 301 U. S. 619 (1937).

12. Mulford v. Smith, 307 U. S. 38 (1939).

13. Osborn v. Ozlin, 310 U. S. 53 (1940) indicates the complete regulatory power over insurance.

broad regulatory powers.[14] But the question arises: By which government are these powers to be exercised?

In any federal system it is necessary to have (1) some delimitation in writing of the respective powers of the two governments—national and state—operating over the same territory; (2) some arbiter to determine when either of the governments exceeds the limits of its powers, and (3) some rule as to which government has superior authority in fields where action may be taken by either.

The constitution of the United States determines the respective powers of state and nation; the United States Supreme Court has, from the beginning, been the arbiter. Where conflict may result from the fact that the two governments seek to exercise powers with respect to the same matter, the constitution of the United States itself expressly provides that "this constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding."

Within the scope of its authority the national government is therefore supreme; the scope of that authority is determined by the constitution; and the language of the constitution is finally construed by an organ of the national government, i.e., the Supreme Court.

Division of Power Between State and Nation

The constitutional delimitation of powers as between state and nation is accomplished by the grant of certain powers to the national government, and by the provision of the tenth amendment that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." By this provision, the national government is specifically made one of delegated powers, and its authority is limited to the powers so delegated.

But it is no simple problem to determine where the powers delegated to the national government end, and where the reserved powers of the states begin. There are no reserved state powers which may be asserted "in hostility to the authorized exercise of federal power."[15] The powers remaining in the states which may be exercised without interference by the national government are therefore only those not within "the authorized exercise of federal power." The states are in the position of a residuary legatee under a will—they take what is left after the determination of the scope of national power. In determining what are these residuary powers belonging to the states, we must discover the scope of the powers delegated to the national government. The powers so delegated are broad in terms. There is, for example, no limit to the treaty-making power. No specific definition or limitation can be laid down with respect to the powers of Congress "to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States;" to borrow money; to regulate commerce with foreign nations and among the several states; to coin money, regulate the value thereof; and to establish post offices and post roads. The war powers of the national government are incapable of specific definition. All of these broad powers are supplemented by a general power of Congress to "make all laws which shall be necessary and proper for carrying into execution" the powers vested in any department of the national government. The general power to enact "necessary and proper" laws is incapable of delimitation by judicial construction or otherwise, and has in itself been the basis for substantially complete federal control of banking, though no such power is in terms delegated to the national government. Except as new issues present themselves, and except as such issues are decided, there is no means of determining the scope of national power. This means also that there is no means of determining the scope of the reserved powers of the states.

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Historical Background

When our government was first organized under the constitution of 1787, and for many years thereafter, there was little exercise of many of the powers granted by the constitution, and little need for the exercise of such powers. But conditions today essentially differ from those of 1787. There were then thirteen states, with less than four million inhabitants, most of whom lived along the Atlantic seaboard, or along tidal waters of the Atlantic. We now have forty-eight states, extending from the Atlantic to the Pacific, and half of these states have been created by the national government out of territory not originally belonging either to the states or to the nation. The population has increased to more than one hundred and thirty million.

More important than increases in territory and population are the changes produced by new methods of transportation and of communication. The battle of Lexington occurred on April 19, 1775, and by the best methods of communication then available, the news reached South Carolina on May 3. In 1787 commercial relations were conducted primarily through the use of sailing vessels, though there was some transportation by land over incredibly bad roads.

14. The scope of delegated authority is well illustrated by United States v. Rock Royal Co-operative, 307 U. S. 533 (1939) and by the dissent in H. P. Hood & Sons v. United States, 307 U. S. 588 (1939).

15. Minnesota Rate Cases, 230 U. S. 353 (1913).

Through the telegraph, the telephone and the radio, and through the steamboat, the railroad, the motor vehicle and the airplane, distances have been abolished, and many probems which were local to a state or to a municipal corporation within the state have become national in character.

The power to regulate interstate and foreign commerce was in 1787 essential primarily as a means of preventing discrimination by one state against another, rather than as a means of control of commercial transactions. Before the declaration of independence the colonies were neither independent of the British crown nor of each other; the colonists as fellow subjects of one common sovereign had common rights extending throughout the colonies. But conditions in this respect were much less satisfactory under the loose alliance of independent states bound together in theory rather than in fact by the Articles of Confederation.

In 1787 the power granted to Congress to regulate interstate and foreign commerce was no more important, and was indeed less important, than the constitutional prohibitions of state actions interfering with the freedom of such commerce.[16] Through new means of transportation and of communication the problem has changed. Transactions in interstate commerce have multiplied by the thousands, and the power to regulate such transactions has proportionately increased with the multiplication of transactions subject to regulation. There has in this and other fields come, not merely an increased power in the national government under the constitution, but an increase in the activities coming within that power, and the necessity for an increased exercise of power that had previously existed. Such an increased exercise of the national power, which really began with the Interstate Commerce Act of 1887, has, however, reduced the scope of state activity, for, where a matter is within the constitutional power of the nation, the exercise of federal power replaces, or may replace, that of the states. The power exercised by the states has been of two types: (1) power exercised in fields where the national government has full power to act, and where the states act merely by sufferance of the national government, so long as that government did not see fit to exercise its full powers; (2) powers which the state may exercise as its reserved powers, without interference by the national government. But where shall we draw the line? As previously indicated, there are no reserved powers of the states that may interfere with the authorized exercise of national power.

Government under the Articles of Confederation failed because there was no means of compelling the states to pay their proportionate share of the expenses. An independent taxing power was necessary if a national government was to endure, but the framers of the constitution could never have dreamed of the use of that power in our present day—for the taxing power now stands alongside of the commerce power as one of the chief sources of federal power.

Decrease of State Importance

In our governmental system the states have steadily decreased in importance. This decrease has been occasioned by (1) an increase in the number of states, half of which have been created out of territory acquired by the national government independently of that previously belonging to the states; (2) the lack of efficiency in state governments, supplemented by the fact that state boundaries have no logical relation to many of our present-day problems; (3) the increased exercise by the national government of powers which undoubtedly belong to it, such exercise restricting the scope of powers previously exercised by the states; (4) an increasingly broad judicial construction of the powers belonging to the national government. Except for the establishment of a flexible and substantially unrestricted source of national revenue through the income tax (Sixteenth) Amendment, little of the expansion of federal power has come through change in the language of the constitution.

If we had authority to plan a new geography for the United States, we would probably reduce the number of states and make material readjustments of present boundaries. We cannot do this, but must seek to determine what position in our governmental structure should be occupied by the states as they are now constituted.

The Commerce Power

So far as the power to regulate commerce is concerned, the United States Supreme Court has made clear its position. Federal regulation has consistently grown, with relatively slight and temporary obstructions by decisions of the Court. These restrictive decisions have been given undue consideration in the discussion of this movement. Once a federal power is denied, there soon begins a whittling process by which the restraint is removed through one device or another; and the final result is the establishment of a federal authority more extensive than that originally denied.

The *Employers' Liability Cases*[17] have been forgotten, and the second Employers' Liability Act has long been in force. *Hammer v. Dagenhart*[18] gave birth to the proposed Child Labor Amendment, and was respectfully distinguished in *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.*,[19] it awaits a more complete distinction or a reversal when the Court comes to consider the validity of the Fair Labor Standards Act of 1938; and the sustaining of the Fair Labor Standards Act will make unnecessary a child labor amendment to the constitution. The National Industrial Recovery Act was held invalid in *Schechter Poultry Corporation v. United States*,[20] in part on the ground that it sought to regulate hours and wages of intrastate employees; and the Bituminous Coal Conservation Act of 1935 was held invalid in *Carter v. Carter Coal Co.*,[21] in part on the ground that Congress had no power to regulate hours, wages and other conditions of labor in the mining of coal to be sold or transported outside the state; but these cases were summarily disposed of in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*,[22] and in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*.[23] And the Bituminous Coal Act of 1937, with the labor provisions removed, has been sustained in the recent case of *Sunshine Anthracite Coal Co. v. Adkins*.[24] All that remains of *Carter v. Carter Coal Co.* is the possibility that collective bargaining of coal miners and their wages and hours will be regulated

16. *The Federalist* (Nos. VII and XI), devoted primary attention to the need for "an unrestrained intercourse between the states."

17. 207 U. S. 463 (1908).
18. 247 U. S. 251 (1918). The Child Labor Tax case (Bailey v. Drexel Furniture Co.), 259 U. S. 20 (1922) is of little force since Steward Machine Co. v. Davis, 301 U. S. 548 (1937).
19. 299 U. S. 334 (1937).
20. 295 U. S. 495 (1935).
21. 298 U. S. 238 (1936).
22. 301 U. S. 1 (1937).
23. 303 U. S. 453 (1938).
24. 310 U. S. 381 (1940).

under the National Labor Relations Act and the Federal Fair Labor Standards Act rather than under the same act as that regulating the price of coal.

In *Railroad Retirement Board v. Alton Railroad Co.*[25] an act for a compulsory retirement and pension system for railroad employees was held invalid, in part on the ground that "the fostering of a contented mind on the part of an employee by legislation of this type" was not "in any just sense a regulation of interstate commerce;" but similar principles are involved in the Railroad Retirement Act of 1937, which is an agreed act, the validity of which is not likely to be contested. And in *United States v. Lowden*[26] distinctions are made which render substantially meaningless what was said in *Railroad Retirement Board v. Alton Railroad Co.*, the Court saying in the *Lowden* case that, "notwithstanding what was said" in the *Alton* case, it should rely upon the Congressional judgment "that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored."

Prior decisions adverse to the power to regulate interstate commerce have ceased to be of weight; and the power to regulate interstate commerce carries with it a broad power "over activities which, separately considered, are intrastate" but which bear "a close and substantial relation to interstate commerce" (Mr. Chief Justice Hughes in the *Santa Cruz* case). A broad federal control exists with respect to railroad safety appliances for all trains, because the security of interstate commerce requires equal safeguards for all traffic, both interstate and intrastate.[27] Intrastate rates of railroads are subject to federal control because the financial condition of a railroad depends upon the combined receipts from intrastate and interstate commerce.[28] "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the states, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field." Stockyards and boards of trade are subject to federal regulation because they are agencies employed for the processes of interstate commerce.[29] And there is little doubt as to the validity of federal regulation of securities and security exchanges.

Federal power to regulate sales on the tobacco market has recently been sustained on the ground that a portion of the tobacco goes beyond state boundaries,[30] and the Court has also sustained an act providing marketing quotas for tobacco, and imposing a penalty of fifty-per-cent of the market price on any tobacco marketed in excess of the quota, saying that the regulation is one of commerce and not of production.[31] With respect to tobacco marketing quotas, there appears to be no answer in fact to the statement, in dissent, that: "It is wholly fallacious to say that the penalty is not imposed on production. The farmer raises the tobacco only for sale. Punishment for selling is the exact equivalent of punishment for raising the tobacco."

Reference has already been made to the *Jones & Laughlin* and *Santa Cruz* cases, in which the Court has sustained and applied the National Labor Relations Act, which is in terms applicable to labor disputes "affecting commerce, or burdening or obstructing commerce or the free flow of commerce, or having led to or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The court has made it clear that the federal regulatory power applies, irrespective of the smallness of volume of interstate commerce or of the slightness of interference with such commerce.[32] And a local electric light company lighting a local railroad station is within the federal regulatory power.[33] The recent Fair Labor Standards Act of 1938, which is almost certain to be sustained, regulates child labor and hours and wages of labor "in industries engaged in commerce or in the production of goods for commerce."

The relationship between the farmer's tobacco acreage and interstate marketing has already been recognized. That of the village storekeeper is no more remote. And the United States Supreme Court will probably be called upon during the next year to determine the federal power to regulate a real property owner because some of his tenants work in a factory the products of which go in part into interstate commerce. Through distinctions and reversals which will find support in recent decisions of the United States Supreme Court, the whole field of insurance may be brought under federal control through the commerce and postal powers. In view of recent decisions of the Court, *Paul v. Virginia*[34] *and New York Life Insurance Co. v. Deer Lodge County*[35] are no longer of weight; and attention may be called to the fact that the present Chief Justice of the United States Supreme Court dissented in the *Deer Lodge County* case.

The production of an article in one state which is or may be sold in another state of necessity affects the market in each of the states, and may be said to have "a close and substantial relation to interstate commerce." And it may equally be said that each time an article is produced and sold within the limits of a state, such production and sale to some extent affect interstate commerce, for to that extent the market is reduced for the sale of a similar article produced in another state. But production for sale in the state of production alone is relatively unimportant, and, even though it be left untouched, the United States Supreme Court has completely abandoned the distinction between production and commerce, which had long been the basis for distinguishing state from federal power—a distinction last announced in the *Carter Coal Company case,* and to which lip-service is paid in *Mulford v. Smith*—and has taken a position which establishes complete federal control over labor and industry. State power is, of course, correspondingly restricted.

It is quite clear that the development of the commerce clause more than accords with the eloquent words of

25. 295 U. S. 330 (1935).
26. 308 U. S. 225 (1940).
27. Southern Railway Co. v. United States, 222 U. S. 20 (1911).
28. Houston, E. & W. T. Ry. Co. (Shreveport Case), 234 U. S. 342, 351 (1914); R. R. Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563 (1922).
29. Stafford v. Wallace, 258 U. S. 495 (1922); Board of Trade v. Olsen, 262 U. S. 1 (1923).
30. Currin v. Wallace, 306 U. S. 1 (1939).
31. Mulford v. Smith, 307 U. S. 38 (1939).
32. Valvoline Oil Co. v. United States, 308 U. S. 141 (1939); National Labor Relations Board v. Bradford Dyeing Association, 310 U. S. 318 (1940).
33. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1939).
34. 8 Wall. 168 (1869).
35. 231 U. S. 495 (1913).

Chief Justice Waite in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*:[36]

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times, and under all circumstances."

Taxing and Spending Powers

The federal taxing and spending powers are equally as broad as the commerce power has grown to be. The federal taxing power is substantially unlimited, and a federal tax may be sustained if it brings in some revenue, even though its primary purpose and effect may be beyond the federal power. Such a view has been taken with respect to the federal Anti-Narcotic Act, and more recently with respect to the National Firearms Act of 1934.[37] And Mr. Justice Sutherland said in *Magnano Company v. Hamilton*:[38]

> "From the beginning of our governments, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends, which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."

It is true that in the *Child Labor Tax Case*[39] the Court said that a penalty imposed under the name of a tax for regulatory purposes could not be sustained, but the weight of this opinion is somewhat reduced by the rule announced by Mr. Justice Stone in the *Sonzinsky* case that "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."

The possibilities of the federal taxing power are just beginning to be fully realized, although the use of this power for other than revenue purposes dates from *Veazie Bank v. Fenno*.[40] Under the view taken in *Florida v. Mellon*,[41] federal tax legislation, by allowing credit for certain state taxes, or for certain conduct by an individual within the state, may force the state to conform to the policies of the national government or may control the actions of the individual within the state. By the statute there involved thirty-six states were persuaded to make changes in their laws. The plan of a federal tax, with a draw-back allowance for compliance with federal regulations has been used in the Bituminous Coal Acts of 1935 and 1937, and in the Social Security Act of 1935. The Bituminous Coal Conservation Act of 1935 was held invalid on other grounds but the Court said that an excise tax of 15 per cent with a draw-back allowance of 13½ per cent was a penalty to coerce compliance with the regulatory provisions of the Act. The Bituminous Coal Act of 1937, which has been sustained, imposes a tax of 19½ per cent on coal mined by those not complying with federal regulations, and exempts those complying with such regulations from the whole of this tax.

By the Social Security Act of 1935 the national government assumes practically complete control of social services within the states, although power to do so is in no way conferred by the constitution. For unemployment compensation a tax upon the employer is levied, but if a state unemployment compensation law has been approved by the Social Security Board the employer may credit against the federal tax the amount of contributions paid by him into an unemployment fund under the state law, the total credit not to exceed 90 per cent of the tax against which it is credited. If a state does not have such a law the whole tax goes into the federal treasury. Before the introduction of this federal law, one state alone (Wisconsin) had an unemployment compensation law; within less than three years thereafter, 48 states had unemployment compensation laws, produced not by coercion but by the persuasive effect of the federal tax. This legislation has been sustained in *Stewart Machine Co. v. Davis*.[42] There is no reason why federal power cannot be used in the same manner to take over control of workmen's compensation for industrial accidents and diseases.

Closely related to the taxing power is the spending power of Congress; and in *Massachusetts v. Mellon*,[43] the court has held that neither a state nor an individual has a sufficient interest to contest the validity of expenditures by the United States. Some restriction on the spending power was imposed by the decision of *United States v. Butler*,[44] in which the Agricultural Adjustment Act was held invalid, but the most essential element of this case is the statement by Mr. Justice Roberts in the opinion of the Court that "the power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the constitution." And what was first sought to be accomplished under the taxing power is now more fully accomplished by control of marketing quotas under the commerce power.[45]

The scope of the spending power of Congress is neither restricted nor enlarged by the opinion in the *Tennessee Valley Authority case* (*Ashwander v. Tennessee Valley Authority*),[46] for that case directly concerned only the Wilson dam, and involved both the commerce and war powers; and a wide spending power on federal projects will almost certainly be sustained if it can be and is challenged. And since the *Butler* case, it has been clearly established that the plan of old age benefits provided by the Social Security Act is within the "general welfare" for which federal taxes may be imposed.[47] Moreover, it has been clearly determined that the court will not control federal loans made to municipal corporations of the states.[48]

Nation and State in Other Fields

The commerce power and the federal taxing and spending powers have been the chief elements in subordinating the states to the national government. But other powers play a part, and although a municipal

36. 96 U. S. 1 (1878).
37. Nigro v. United States, 276 U. S. 332 (1928); Sonzinsky v. United States, 300 U. S. 506 (1937).
38. 292 U. S. 40 (1934).
39. 259 U. S. 20 (1922).
40. 8 Wall. 533 (1869).
41. 273 U. S. 12 (1927).
42. 301 U. S. 548 (1937).
43. 262 U. S. 447 (1923). See also Alabama Power Co. v. Ickes, 302 U. S. 464, (1938); and Tennessee Electric Power Co. v. Tennessee Valley Authority (1939) 306 U. S. 118.
44. 297 U. S. 1 (1936).
45. Mulford v. Smith, 307 U. S. 38 (1939).
46. 297 U. S. 288 (1936).
47. Helvering v. Davis, 301 U. S. 619 (1937).
48. Alabama Power Co. v. Ickes, 302 U. S. 464 (1938).

bankruptcy law was held invalid as an encroachment on state power,[49] the necessity of resorting to the federal bankruptcy power in aid of insolvent municipalities justified the judicial action in supporting a later statute.[50]

Decisions in other fields also show the tendency toward subordination of state to national power. The doctrine of mutual exemption from taxation of the agencies and employees of the respective governments finds basis in the assumption that, with certain exceptions,[51] the two governments were of equal standing; but the decisions which have in large part abandoned this doctrine clearly indicate that the national government, while taxing agencies and employees of the states, will have continued power to exempt federal agencies and employees from state taxation.[52] Equality will thus depend upon the discretion of Congress.

Some decisions favorable to state power may have a reaction in the opposite direction. *Erie Railroad Co. v. Tompkins,*[53] abandons a long list of precedents and makes state law more important than before in trials at common law in federal courts; but, in spite of the language of the opinion, Congress has power to determine what law is applicable in the federal courts, and the statute dealt with in *Erie Railroad Co. v. Tompkins* does not apply to equity cases.[54] The probability is that the need for uniformity will lead to federal legislation reducing the weight of state law in cases at common law tried by federal courts.

Decisions of the United States Supreme Court favorable to state power often lay the foundation for the exercise of expanding national power which replaces in whole or in part what might have been done by the states. Each decision extending state powers over domestic transactions equally extends congressional power over similar interstate transactions and over intrastate transactions which affect interstate commerce. The court has expressly said that: "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce."[55] The cases of *Nebbia v. New York,*[56] and *West Coast Hotel Co. v. Parrish,*[57] removed the previously-existing "due process" restrictions upon state price-fixing and minimum wage legislation, and at the same time opened the door for the federal regulation of prices and for the federal Fair Labor Standards Act. The result is a wider theoretical power in the states, but a narrower field within which the power may be exercised.

Recent decisions favorable to state barrier legislation will perhaps do more than anything else toward correspondingly reducing the sphere of state activities.

In reinstating multiple taxation of intangibles, *Curry v. McCanless*[58] appears favorable to state power, but may force the federal establishment of uniform standards for state taxation of estates; and *Florida v. Mellon* provides the means through which the federal government may enforce such standards. The recent opinion in *McGoldrick v. Berwind-White Coal Mining Co.*[59] may lay the foundation for such burdensome multiple state taxation on interstate transactions as to require federal intervention. State barriers with respect to the liquor traffic are recognized by the Twenty-first Amendment, but equally serious barriers with respect to the less objectionable business of writing insurance are imposed by the recent opinion in *Osborn v. Ozlin.*[60] The dissent of Chief Justice Hughes in the *Berwind-White Coal Mining Co.* case adheres to the position that the Court must maintain the immunity of interstate commerce from discriminatory state burdens. In *McCarroll v. Dixie Greyhound Lines,*[61] the Court took this view with respect to a discriminatory Arkansas tax on gasoline used in interstate automobiles or trucks, but three dissenters (Black, Frankfurter and Douglas) expressed the desire to "leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the states." Instead of permitting state power to be exercised within proper bounds, this would involve the occupancy of the whole field by the national government. As to motor carriers there are certain matters of national importance now governed by the Federal Motor Carrier Act of 1935, but where a matter is properly within the competence of the state, nothing is to be gained by judicial refusal properly to control state action in order to compel the replacement of state by federal action. But the final result will be more complete federal action. State barriers toward which the Court now appears to take a favorable attitude are the restraints upon intercourse between the states which the Constitution sought to prevent, and they must be prevented either by judicial application of existing constitutional restraints or by affirmative federal action.

States Have No Reserved Powers

During periods of war the national government has necessarily dominated, and the states have fallen into the background. Upon the termination of war the states have usually reacquired to some extent the status which they previously had. But during war or peace they have steadily become less important in our governmental system, particularly since the termination of the Civil War. This development is not of recent origin. The broad construction of federal powers dates from *McCulloch v. Maryland*[62] *and Gibbons v. Ogden.*[63] The possibilities of the federal taxing power were indicated by *Veazie Bank v. Fenno.*[64] Federal grants and subsidies began almost with the creation of our nation, and their history is interestingly told in Charles Warren's *Congress as Santa Claus* (1932). But progress toward national control has been greater during the past seven years than during our whole history prior to that time. This situation was brought about by the most serious depression that this country has ever faced. States and municipal governments were unable to meet the situation. As Mr. Justice Cardozo said in *Steward Machine Co. v. Davis:*[65]

"The fact developed quickly that the states were unable to give the requisite relief. The problem had be-

49. Ashton v. Cameron County Water Improvement District, 298 U. S. 513 (1936).
50. United States v. Bekins, 304 U. S. 27 (1938).
51. South Carolina v. United States, 199 U. S. 437 (1905).
52. Graves v. New York, 306 U. S. 466 (1939); Pittman v. Home Owners' Loan Corporation, 306 U. S. 21 (1939).
53. 304 U. S. 64 (1938).
54. Russell v. Todd, 309 U. S. 280 (1940).
55. United States v. Rock Royal Co-operative, 307 U. S. 533 (1938).
56. 291 U. S. 502 (1934).
57. 300 U. S. 379 (1937).
58. 307 U. S. 357 (1939).
59. 309 U. S. 31 (1940).
60. 310 U. S. 53 (1940).
61. 309 U. S. 176 (1940).
62. 4 Wheat. 316 (1819).
63. 9 Wheat. 1 (1824).
64. 8 Wall. 533 (1869).
65. 301 U. S. 548 (1937).

come national in area and dimensions. There was need for help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare."

Closely related to problems of relief were those with respect to industrial adjustment, social security and labor conditions. We thus had the foundation laid for liberal judicial expressions with respect to state mortgage moratorium laws and minimum wages and with respect to federal power in the fields of labor and social security. Under such conditions the initial resistance shown in the *Schechter* and *Carter* cases was sure to be broken down; and, in abandoning the position in those cases, the Court of necessity adopts a view as to federal power which substantially gives the national government authority to occupy the whole field of reserved state powers. There remains little power not delegated to the United States by the constitution as now construed, and therefore little power reserved to the states. The Court remains the arbiter to determine whether either government exceeds the limits of its powers, but its function as arbiter has primarily become that of keeping the states within the limits of their power. With respect to national powers we have substantially reached the position taken by Mr. Justice Holmes when he wrote:

> "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the union would be imperiled if we could not make that declaration as to the laws of the several states."[66]

The Court has not lost its power to declare an act of Congress void, but has so construed the constitution that there will be little scope for such action in the field of governmental powers. The balancing of power between state and nation is now committed to the political rather than to the judicial organs of the national government. Congress and the national executive will determine the scope of state power by determining the extent to which the nation shall exercise its power.

Future of the States

The states have an important share in the governmental functions of a nation as great in area and population as is the United States. In dealing with the present social and industrial problems of this country, state, nation and local governing bodies are each essential to the other, and close cooperation among them is necessary if governments are adequately to perform their increasing duties in modern society. With the enlarged power of the national government, there is real danger of too great a concentration of authority in the national capital. During the last few years states and municipal corporations within the states have gone like beggars to Washington, prepared to exchange their independence for federal funds. They have thus tended to become mere agencies of the national government. Co-operation results in domination when one of the co-operating bodies is the more powerful, and controls the funds to be used by the other, for the hand that holds the purse-strings rules the nation. The national government now exercises a large influence over the policy of state universities, and it has been proposed that this influence be extended to the whole public school system. The federal housing program now in process pays lip service to decentralization, but in fact centralizes control in the hands of a national agency.

The movement is well under way for the subordination to the national government of the employees of state and local governments. The amendatory Hatch Act, approved July 19, 1940, has the desirable objective of preventing pernicious political activities by state and local employees in connection with any activity which is financed in whole or in part by loans or grants from the federal government, but the act establishes machinery for an efficient discipline of state and local officers by any national administration which desires to exercise such a discipline in its own interests. And a movement is now under way to subject state and local employees to the Federal Social Security Act, and thus to replace state retirement and pension funds for such employees. Here again federal control and federal discipline will replace that of the state and local governments.

The decreasing importance of state lines is in part due to the states themselves; in part to changes in economic and social conditions which have brought a widened judicial construction of national powers; and in part to a natural desire of the national government to exercise powers which strengthen the political control of those in power. Whatever party may be in control, a government seldom surrenders powers which it has once assumed; and many economic and social problems require national action. But a large field of activity remains and should remain for the states, and they can best preserve their authority in such fields through more efficient administration, and by co-operation with each other through interstate compacts or otherwise.

The scope of state authority has become a question of governmental policy, and has largely ceased to be one of constitutional law. State powers are incidents to the issue as to the form of government that will in the long run best function in this country. The question is a practical one as to which we have had recent experience. With respect to national prohibition, the gain in a uniform standard and in national enforcement was more than offset by inefficient national administration and by the loss of a sense of responsibility upon the part of state and local governments. May we not expect a similar result with a nationally dominated social security program? After all, government is a social institution and not a machine, and its success in achieving results must depend upon close contact with, and control by, those whom it serves. The value of a uniform standard established by a single central government is often more than offset by the loss of local control of the process of trial and error which may be employed by the several states. Had we, thirty years ago, placed the administration of workmen's compensation under the control of the national government, conditions might have been worse than they have been. The transfer of control to the national government may in many cases cause loss rather than gain in the achievement of the objective of better social and industrial organization.

Although the position of the states has materially changed, both from a constitutional standpoint and as agents for the performance of governmental functions, they are still essential elements in our constitutional structures; but, in view of recent developments in the field of constitutional law their future status must be determined at the polls and not by the courts.

66. Collected Legal Papers, pp. 295-96.

BOMBS ON LEGAL LONDON

By Franklin E. Vaughan

of the Chicago Bar

THE news of the roar of high explosives and the glare of fires from incendiary bombs in the heart of London brings to us a picture of the destruction of revered and irreplaceable mouments of antiquity. When we read in the "London Letter," published in the December, 1940, number of the JOURNAL, of the crashing of the Hall of the Inner Temple, and the falling of bombs upon the Royal Courts of Justice and the Public Record office, we realize that what is commonly known as Legal London is the object of the latest Nazi attacks upon military objectives.

Great as would be the money loss if New York City were bombed, there is little in physical property in that City that could not be replaced. In London and Paris, in contrast, there is much in the form of buildings, art treasures, records and documents that, once destroyed, would be gone forever. In Legal London alone is found a tremendous wealth of such material, contained in a comparatively small extent of territory.

In the Ninth Century, London was a walled city about one mile square, on the North bank of the Thames. The corners were somewhat rounded but it actually contained 1.03 square miles of land, surrounded by walls, with eight entrance gates. The South wall was soon found unnecessary and allowed to crumble. One bridge provided access from the south, through a gate closed at nightfall.

The territory so enclosed is to this day known as "The City" and has its separate government, with a Lord Mayor and Aldermen. It has about 12,000 permanent residents, while Metropolitan London, in the center of which it lies, has about ten million people spread over an area of approximately 600 square miles. Through this oval city, paralleling the Thames at a distance of about one-eighth of a mile, ran a main highway, with a gate at its western end. Also, from North of the City, a little East of its Western wall, ran a small stream emptying into the Thames, called the Fleet; hence, the name of Fleet Street for this highway.

Just outside the city walls, to the West, were pleasant green meadows sloping to the Thames. As it became safe to live outside, these meadows were built up with fine homes of nobles. Fleet Street continued Westward without the walls and was known outside as The Strand.

Legal London of today is a strip of land approximately one-half mile in width, from East to West, and about three-fourths of a mile in length, from North to South, lying mostly within the boundary fixed by the old West City wall, but in part without. Inside this comparative small area of probably not to exceed three-eighths of a square mile, not only are the barristers and solicitors trained and admitted to practice, but also the great mass of the law business and the Court work for a city of ten million people, and including appeals from a still larger district, is carried on.

Most readers are familiar with the four Inns of Court. Just inside the Western boundary of the old city, and South of Fleet Street, lie the beautiful and absorbingly interesting Temple Gardens, containing two of these Inns, the Inner Temple and the Middle Temple. These grounds originally belonged to the Knights Templar and when that order was dissolved in 1312, passed to the Crown and later to the Knights Hospitaller of St. John, who leased it in the 14th Century to certain professors of the common law. The Middle and Inner Temples were always separate societies and in 1608 James I leased the property in perpetuity "To the Benchers of the Inner and Middle or New Temple," subject to a yearly payment by each of ten pounds, which, it will be a relief to know, was commuted in 1673. In the early days these pleasant grounds sloped to the waters of the Thames, where there was a Water-gate or landing. At present, the North bank of the Thames is here bordered with a massive wall and a broad boulevard, known together as the Victoria Embankment, from which the Temple grounds are separated by a high iron fence with beautifully wrought iron gates.

There is no more delightful place to loiter than the Temple grounds. Entering through an ancient archway, just at Temple Bar (the meeting of Fleet Street and the Strand), one passes instantly into another and quieter world. Two years ago each society had a beautiful hall and a library, while the two used in common the very old Temple church with its imposing effigies of Crusaders lying in full armor. Besides these buildings, the Temple grounds contain numerous old brick structures occupied largely as living quarters by students, barristers and other persons to whom the quiet atmosphere appeals. As there are no partnerships among barristers, their living rooms are usually also their offices. The greater part of the law business outside of Courts is handled by solicitors, and firms of solicitors also have offices here. Among the many famous writers who lived there in the past were Dr. Samuel Johnson, Oliver Goldsmith, Charles Lamb, Thackeray and the poet, Cowper. Goldsmith lived just above Blackstone and annoyed that austere and learned gentleman greatly by the riotous parties he gave whenever he had been fortunate enough to sell a poem or a play. He is buried close beside the Temple Church.

Famous members of the Inner Temple included Lyttleton, Coke (who was a bencher before he was Lord Chief Justice), John Selden, called the greatest of the benchers, the two Barons Pollock, the infamous Lord Chancellor Jeffreys, Ellenborough, Chief Counsel for Warren Hastings and Samuel Warren, author of "Ten Thousand a Year." In the Middle Temple, Fielding, the novelist, was a barrister as were also Edmund Burke, Lord Blackstone and Eldon.

The gardens are otherwise made up of great trees, quiet shady walks, green lawns and colorful flower beds and are filled with the music of playing fountains and the twittering of numerous birds. The two halls of the Inner and Middle Temple are simply very beautiful, large dining halls. Pictures recently published

show the great damage already done to the Hall of the Inner Temple by a Nazi bomb. The Middle Temple Hall, dating from Elizabeth's time, had a marvelous hammer-beam oak ceiling. The windows contained the arms of distinguished members and below the windows were hundreds of wooden plaques bearing the coat of arms, in colors, of former Readers and Treasurers of the Inn.

The normal period of study at an Inn, before being called to the bar, is three years. Each year consists of four terms and a rigid requirement is that each student in residence must "Keep Terms"; that is, he must eat at least six dinners in each term in his hall. Both lunches and dinners are served there daily. Across the upper end of each hall is a massive table, occupied by the governing barristers, called benchers, and by the readers. Next are a series of tables running lengthwise for the admitted barristers and below them, similar tables for the students.

The food used to be said to be excellent and each group of four students or barristers was entitled to one bottle of sherry or port, as desired, for each dinner, with beer, ale or porter *ad lib*. At three or four special dinners in each year champagne was substituted. During the dinner, a reader propounds legal problems, which the students are required to discuss. Final examinations, consuming three days, are held at the end of each year, but no matter how perfect an examination a student may write, he may not be called to the bar until he has eaten the requisite number of dinners in his Hall.

In addition to the two Temple Inns, there are Lincoln's Inn and Gray's Inn. All have the same essential buildings, customs and characteristics and all four are on an absolutely equal footing. They average about three hundred enrolled students per year, with about sixty benchers, although Lincoln's is slightly larger, with eighty benchers.

Besides Fleet Street and its continuation, the Strand, Legal London is crossed by one other street running East and West, about one-half mile North of these streets, known as High Holborn and is bounded on the North by Theobald's Road, running parallel to High Holborn and about one city block North of it. From Temple Bar on the South to High Holborn, Legal London is traversed, North and South, by Chancery Lane, so that, on leaving the Temple, the natural walk is North along Chancery lane.

To the left, or West, of Chancery Lane and just outside the limits of the old City, are the Royal Courts of Justice, a series of beautiful Gothic buildings, all joined together, and for the most part, erected in 1874. Before 1874, the Courts were held in Westminster Hall and its adjoining buildings. Here sit the three divisions of the Trial Courts, "Kings Bench," "Chancery" and "Probate, Divorce and Admiralty," with twenty-five *nisi prius* or trial judges, headed by the Lord Chief Justice. Here, also, sits the Court of Appeals, presided over by the Lord Chancellor, and the recently created Court of Criminal Appeals.

The walls of the Court buildings, inside and out, and the floors, are of gray stone and the effect inside is rather chilling. Court rooms are smaller than in America, with the Judge's bench raised high, above the lowest floor, so that the Clerks of the Court, Court stenographers and similar officials are below, almost out of the Judge's sight, and are constantly ducking in and out of small doors, like woodchuck holes, beneath him. The room slopes steeply from rear to front, with a series of benches, facing the Judge, each having a narrow, raised desk in front of it.

A great quiet and dignity reigns in an English Court room. This is aided by the white wig, its cue tied with black ribbon and the black robe, worn by each barrister and is assisted by the red robe with its ermine trimmed capes and the curled wig of the Judge. Also, the Judge's position above the level of the Court room, somewhat as in a pulpit, is effective. Most of the barristers are quite obviously in fear of the Judge.

Barristers, in addressing the Court, do not come forward, but rise from their benches and spread their voluminous masses of papers and notes before them on the narrow desks. Behind the barrister sits the solicitor who has retained him and the client whom he probably met just before the hearing. Arguments are constantly interrupted by questions from the Court, both as to facts and law. If as to facts, the barrister turns his back to the Judge and engages in a whispered conference with Solicitor and client, after which he addresses the Court something like this: "I am instructed, M'Lud, to say that on the day in question the plaintiff was proceeding to the green grocer's, to purchase a six-pence ha-penny worth of cabbage."

Each Court room has a steeply inclined Visitor's gallery high up, across the rear, which contains five or six rows of benches. These galleries are entered from high halls close to the roof of the building. Round towers are constructed at various corners of the buildings and in each of these is a circular stone stairway of endless steps which the visitor climbs until he emerges into the Upper Hall.

The buildings of the Courts occupy a space approximately 500 feet square, just North of the Strand and West of Chancery Lane. To the North of them are the grounds and buildings of Lincoln's Inn, entered through an ancient and interesting gateway, from Chancery Lane. In the center, above this gateway, appear the arms of Henry the VIII, on the right, those of the Earl of Lincoln, who gave the grounds, and on the left those of Sir Thomas Lovell, builder of the gate and twice a reader here. Lincoln's Inn resembles the two Temple Inns in all essential respects, except that it is not, in the opinion of some, as beautiful. It has both an old and a new hall. The former, still used for lectures and examinations, but not for dinners, served for many years as the Court of Chancery and is the scene of the hearings in the case of *Jarndyce v. Jarndyce*.

The chapel is interesting in that the first floor is elevated upon a series of arches, rising from the ground level, paved with stone slabs, to a height of about ten feet. These are entirely open, giving the effect of a crypt above ground or a mass of cloister arches. It is said that formerly lawyers used to appoint these arches as meeting places with their clients and to loiter there in the hope of picking up casual customers, but it is certain no such undignified customs prevail today. The attendant avers that the library of Lincoln's Inn is the largest legal library in existence. He assures skeptics that there are many thousands of volumes, in addition to those visible, stowed away in underground vaults. Lincoln's Inn claims, among its celebrities, Horace Walpole, Sir Thomas More and John Donne, the preacher and poet. Isaac Walton lived in a house on Chancery Lane, close to the gate of Lincoln's Inn.

East of Chancery Lane, stands a large gray stone

building which is a veritable treasure house for any student of English History or the history of the English Law. This is the Public Record Office, in which have been collected practically all the written records of England, except such as are so recent as yet to demand secrecy. This wealth of material is all accessible for study under very reasonable restrictions and convenient conditions. A considerable number of such documents as are likely to interest the public are gathered together in a museum, which was originally a beautiful Gothic Chapel, formerly known as the Chapel of the Rolls, and founded by Henry III as a place of worship for converted Jews.

Here can be seen such documents as the two original Domesday Books, prepared by the Monks for William the Conqueror and setting forth in beautifully clear, Norman-Latin lettering, all the property, real and personal, in England, subject to taxation, together with the names of its owners. Here is the will of the Black Prince, signed by him; also, a letter written by Chaucer and the earliest known signature of an English King, Richard II, appended to a letter, dated July 26, 1386, to the Earl of Suffolk, and granting to the prioress of St. Mary Magdalen's a tun of red Gascony wine, yearly, at Christmas. This letter is signed "Richard," whereas, on all earlier existing documents, the Kings merely made their marks beside their names written by some scribe.

Here, also, are letters of Henry the VIII, Katherine of Aragon, Anne Boleyn, Cardinal Wolsey and Mary Queen of Scots; letters from the Earl of Leicester and his rival, the Earl of Essex, to Queen Elizabeth and innumerable others intensely interesting. Perhaps the most pathetic is one from the beautiful little queen for nine days, Jane Grey, signed in her childish hand, "Jane, the Quene." Here, too, is the original "Scrap of Paper," guaranteeing the integrity of Belgium.

Undoubtedly the documents of greatest interest to lawyers, however, are five illuminated "plea rolls," covering dates from 1514 to 1556. These were the first pleadings in law suits, addressed to the King and beseeching the King's justice. They took the place of the modern declarations or complaints. Each roll consists of many sheets of parchment, about three feet long and one foot wide, joined together at the top and making a pile about four inches thick. Each first page commences with a large letter P. measuring about one foot by ten inches, illumined in gold and colors, containing a painting of the King, to whom the plea was addressed, attended by some members of his Court or family. The other letters on the first page are beautifully done, each about one and one-half inches in height, while the remaining pages are covered with closely written lines of letters about one-quarter inch in height, all as clear and accurately aligned as in modern steel engraving. The entire documents, of course, are in Latin. The series of Plea Rolls in the Public Record Office extends from the reign of Richard I in 1189, to that of Victoria in 1901.

On the West side of Chancery Lane is the massive building of the Law Society. This organization of about nine thousand solicitors controls the education and training of articled clerks intending to enter that branch of the profession, their admission to practice and their discipline thereafter. There were, at one time, a considerable number of Inns of Chancery, under the control of the four Inns of Court, in which solicitors were educated and admitted in somewhat the same manner as are barristers today. These Inns have long since been abandoned, however, and all their powers and duties are now exercised by the Law Society.

The remainder of Chancery Lane, North to High Holborn, is largely taken up with offices of solicitors, Commissioners of Oaths, law stationers, law book sellers and similar allied businesses. Crossing High Holborn, upon leaving Chancery Lane, one enters the narrow passageway leading to Gray's Inn, lying between High Holborn, on the South, and Theobald's Road, on the North. Gray's Inn contains some beautiful gardens and two grass grown and tree-shaded Courts, flanked by the Hall, Chapel and Library and the typical buildings of Chambers. Its grounds were first leased to certain "students of the law" about 1513 for six pounds, thirteen shillings, four pence per year; this lease was renewed by Henry VIII and the Inn has long since bought the freehold. Its two most famous barristers are Nicholas and Francis Bacon, father and son. The father became Keeper of the Great Seal. His son, Francis, was a student at the age of fifteen, in 1576, and was called to the bar in 1582, when he passed his twenty-first birthday.

For many years the four Inns of Court united in annual Christmas Revels. These were held in rotation at the several Inns, commencing just before Christmas and finishing after New Years Day. The first part consisted of ceremonies of a serious nature, which were followed by Post Revels, performed by the younger men and involving dances, masques and plays. Tradition has it that Shakespeare, himself, took part in a performance of "Twelfth Night" in the Hall of the Middle Temple, as a part of one of these Post Revels. It is certain that he was very familiar with the Middle Temple, since he places the meeting of Richard, Duke of York, and the Earls of Somerset, Suffolk and Warwick in the Hall and has them adjourn to the garden because,—"Within the Temple Hall we were too loud." It is in the Temple garden that York and Warwick pluck white roses while Somerset and Suffolk pluck red, thus starting the long Wars of the Roses. Gray's Inn was particularly famous for its so-called Masques.

The territory just described includes substantially the whole of Legal London. To traverse it, including the strolls in the gardens and buildings, probably involves a walk of only a little over a mile. Before the recent bombings, the American visitor who was not too tired could walk back South from Gray's Inn, down Chancery Lane, to the Old Cock Tavern, on Fleet Street, just East of the entrance to the Temple, and stop there for a rest and a "spot of food."

This Tavern, which claimed continuity of existence from Samuel Johnson's time, was made famous by Thackeray's poem to its waiter and was largely frequented by law students, barristers and even judges. In the rear were booths, each with a large umbrella rack at the end, necessary since it is indecent for any gentleman to walk the streets of London in the daytime without an umbrella hooked upon his left arm.

Comfortably seated upon a black oak bench, two years ago, the American could enjoy his steak and kidney pie, with a pint of bitter. At the same time, if he was fortunate enough to understand the English language, he could probably listen to instructive legal discussions from the neighboring booths and reflect on what might happen to this ancient home of British tradition if German bombs were successfully dropped within the small limits of Legal London.

THE WORK OF LAWYERS FOR NATIONAL DEFENSE*

By Edmund Ruffin Beckwith

Chairman, Committee on National Defense of the American Bar Association

THERE are several aspects of this subject and several ways of approaching them, but we can be certain at the beginning that some kinds of activity do not come within our present scope. For example, I shall not concern myself now with any matter of national policy or of international law, nor with the functions of counsel to enterprises engaged in the production or transport or other servicing of defense materials, and I shall not deal with the lawyer as a member of the armed forces whether in the line or in military intelligence or as a judge advocate, nor as counsel to any branch of government.

By excluding these subjects I do not mean to imply that it would not be useful for the bar to have a wide knowledge of such matters. Younger lawyers especially could study military justice and the law of government contracts with profit to themselves and to the country if they should find themselves called up, and the Committee on National Defense hopes to help in devising methods which may facilitate that kind of study. Many lawyers may find a large field of usefulness if they will inform themselves fully about military government as it may happen to function in respect of our outlying bases, or martial law as it may be invoked at some time or other, and about certain related legal subjects bearing upon the cooperation of police and constabulary organizations with the military. I might remind you that there is a new tactical term in the world,—"vertical attack." Such offensive action may move downward from planes or parachutes. It may also move upward through "fifth column tactics" and in other ways. If such an attack should occur in any community a species of legal emergencies might arise with which few American lawyers are presently familiar.

And now, having so readily said what we shall not consider, I have to admit that after constant study since the Committee on National Defense was appointed more than three months ago I am still very far from being sure of just what we mean by "national defense" as lawyers may be specially concerned with it. We know it is something that every loyal citizen should work for, but there is a very wide difference between the meanings of "work" as a set of tangible actions and as an activity in the field of ideas with which lawyers are characteristically engaged. The work of individual lawyers is a different thing from that of bar associations, and in either respect there are important distinctions between the things which may be done on a nation-wide scale and those that inhere in the needs and service of a locality or even of a state.

We are engaged in a field so novel that we can have little sense of precision, but in a general way we have come to believe that lawyers and their organizations can most effectively employ their energies for national defense along five lines to which we might give names like these:

Organization
Personal services
Morale including information and comment
Institutional influences, including legislation
The organized bar as a public agency

Organization

By organization for the present purpose I mean something at once narrower and more intense than the usual pattern of a bar association would allow, but not in any way a thing fit only for the emergency. We shall have little reason to be pleased if what we do now does not endure to become the foundation of much more.

The present facts are these. In every state—and this includes the District of Columbia, but we need not now consider the territories and possessions,—there is a state bar association. Taking all of them and all the local associations together there may be 110,000 members of them all, including also the 31,000 members of the American Bar Association. But there are probably not less than 50,000 other lawyers in the country, possibly 70,000, who are not members of any association. The majority of these men do not see the journals of the associations or the committee reports, and they have little conception of organic professional thought or action. Yet like most lawyers they are capable men, men of honesty and courage, leaders of opinion in their communities. We shall not truly mobilize the resources of the bar in the common defense until we find a way to establish continuing contact with this one-third of our whole number.

Stated in an even more sensational way, there are less than 1,000 bar associations worthy of the name, excluding those which exist only to elect officers or to have an annual fish-fry. But there are 3,070 counties in the United States, and even when allowance is made for the active district or circuit associations there is almost no organic vitality of the bar in something like two-thirds of all the administrative and judicial unit-areas of the country. In many rural counties there may be only one lawyer, but even that one speaks to his own people with an authority of leadership which it is our business to coordinate, if we can, with our own best efforts for the general good.

The Committee on National Defense conceives that its purposes are different from those of the more conventional committees of bar associations. In addition to certain work of its own it acts as a general clearing house. It should collate from the government, the public and the bar every kind of useful information relating to defense and disseminate it as widely as possible among the lawyers of the whole country. For this purpose we hope to work only through the state and local bar associations and having now observed the results in several states we are ready to ask the

*An address delivered at a Conference of State and Local Bar Association executives and committees of the First and Second Federal Judicial Circuits at the Parker House, Boston, January 15, 1941.

remaining state associations to cooperate with us, by setting up committees which will be as widely representative as their local patterns of action will permit, and thereby to make it possible for the communication of ideas to reach into every county.

An adequate plan would provide that the strong local associations would be responsible for their own and possibly adjoining counties, the state bar for the remaining areas; and the state committee on national defense would be so selected as to represent not only existing organizations, by counties or judicial circuits or what not, but also to bring in from districts where there are too few lawyers to make up local organizations one or more of the leading men. In some states these might uniformly be chosen from among the county or district attorneys.

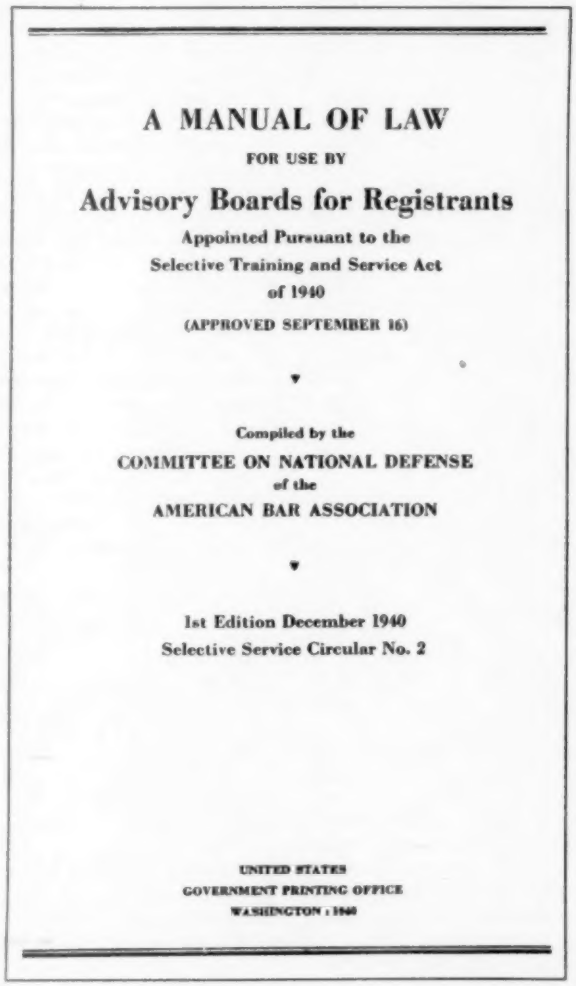
Our work is not like that of the usual committee. We are not concerned with the technical fields already preempted by able groups in many associations. But we know that we are right in trying to create a sensitive and responsive instrument of nationwide extent because the men best qualified for leadership of a democratic people will find ample use for their talents and for all the strength which they can muster by acting together.

This is not a surreptitious drive for memberships. It is not of any importance to us whether a man belongs to any association if he is the kind of man who will work with us and help his own community.

Personal Services

By personal services I mean chiefly the work of lawyers for men already in the armed forces and for those who will volunteer or be inducted, and for their dependents. We have now for this work the Advisory Boards for Registrants, each composed of three or more lawyers, at least one for every county and roughly one for each 60,000 of the population. It is estimated that well over 50,000 lawyers have already volunteered on such boards and this does not take account of the Government Appeal Agents or the lawyers who are serving on local draft boards or appeal boards or as counsel for State Headquarters of Selective Service or in other capacities. These advisory boards were not originally set up to be very effective units in any general way, because they were limited by the Regulations to giving advice only about the questionnaires and claims of registrants. I am happy to say that amendments of the Regulations were brought about in part by the persuasions of our committee, so that the members of the boards are now encouraged to help everyone connected with the armed forces who may need advice in any field of law.

Because there was no suitable text-book our committee compiled its "Manual of Law" which the Selective Service System has published through the Government Printing Office in an edition of 150,000 copies and is now distributing to everyone connected wth the System. Any member of an Advisory Board for Registrants or other official agency may obtain his copy by writing to Selective Service Headquarters, and others may obtain them from the Superintendent of Documents, Washington, at the price of 15 cents per copy.



A MANUAL OF LAW

FOR USE BY

Advisory Boards for Registrants

Appointed Pursuant to the
Selective Training and Service Act
of 1940

(APPROVED SEPTEMBER 16)

▼

Compiled by the
COMMITTEE ON NATIONAL DEFENSE
of the
AMERICAN BAR ASSOCIATION

▼

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Selective Service Circular No. 2

UNITED STATES
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The men already in camp may have problems which are excessively burdensome to them because their homes are far away. At the suggestion of our committee the War and Navy Departments have notified the commanders of all forces, camps, ships and stations that the bar is available when needed.

The Bureau of Navigation of the Navy issued on January 14 a circular which reads in part as follows:

Attention is directed to the fact that certain legal services are now available to the personnel of the Navy in every county of the United States.

These facilities have been developed through cooperation with the Director of Selective Service by the Committee on National Defense of the American Bar Association. Pursuant to paragraph 145, Selective Service Regulations, Advisory Boards for Registrants, composed of lawyers, have been established in each county in every state for the purpose of advising registrants with regard to the processes of Selective Service. By an amendment of Regulation 103, the members of these Boards have been recently encouraged to give advice generally with regard to the Soldiers' and Sailors' Civil Relief Act or other matters; and it is understood that the members of the legal profession will generally desire to be of service not only to registrants for Selective Service but to men already in any of the Services and their dependents.

The circular issued by the Adjutant General of the Army on December 28, 1940, contains this statement:

It is apparent that the members of advisory boards for registrants are, as members of the legal profession and acting in their individual capacities, in a position where they can, as a patriotic service and without conflict with

their official duties, render legal advice on matters beyond the scope of selective service processes not only to registrants and their dependents but also to persons serving in the armed forces.

Yes, it is apparent and more than that. It is everlastingly right that no such problems shall go unsolved, for only so shall we perform our high duty in the cause of justice while we help to maintain the morale of the men who are in training or in service for the country and for us.

There have been some discussions about fees in such matters and a three-way basis has been developed which appears to be satisfactory. With respect to advice given by the advisory boards which relates directly to the processes of Selective Service, no fee is to be charged. In any other kind of matter if the man affected is unable to pay a fee,—in other words, if the case is of the ordinary legal aid type,—no charge is to be made. In all other cases, any employment is expected to be compensated in accordance with usual and proper standards. Most men whose normal civilian affairs require counsel have already selected them or will readily do so. As to all others it is patently necessary that the bar shall take care to see that the right people and the best methods are employed for this great responsibility.

There are some other kinds of personal service which will develop and may require the general supervision of the bar. One of these comprises various plans whereby the practice of lawyers called up for service may be conserved. This may be almost as important to their clients as to them while clearly it involves a responsibility of the bar to the public.

Morale

The work of the organized bar in the interest of the general morale will comprise a variety of activities, some of which are only just beginning to be studied.

For example, there was an uproar after the World War about our system of military justice and many people were made unhappy by imaginary terrors. To some minds a military court is the same thing as a revolutionary tribunal in 18th Century France or recently in Russia, with drums rolling and a firing squad in waiting. The fact is that our system of court martial is careful, fair and just. Its judgments are stern, as they have need to be, but they are more honestly arrived at and the rights of the accused are more rigidly guarded than in many a decision of the criminal courts. The fact is that the chance of an innocent man's conviction or of a guilty one's excessive punishment by an Army or Navy court martial is practically non-existent. The bar can perform a valuable public service by informing itself on this subject and making the facts clear to the people.

For another example, the American Bar Association has a very old Committee on American Citizenship which long ago began to do a good work in creating and stimulating public interest in our basic institutions. The Committee on National Defense will do everything it can to cooperate with the citizenship committee. My own belief is that lawyers are the natural expositors of our heritage, the ablest proponents of the conservation of our way of life. On such subjects lawyers speak without the tub-thumping of the partisan or the screeching of the ignorant and without confusion but with the power of knowledge and the eloquence of courage. The public gain is great.

The Junior Bar groups have enrolled a great number of eager young men and the bar generally will find them useful partners in a field of growing significance. The morale of our people has not been put to any real test since the whole face of the world was changed. The bar clearly has a duty to be ready for that test, and I know of no better way to begin than to join hands with the clear-eyed and vigorous patriots among these young lawyers.

We will hear much about the work of other committees and sections in familiar fields such as the protection of civil liberties and the enactment of defense legislation. There is also a great thing which is new. Along with other actions designed to forward cooperation among the free countries of this hemisphere the bar in each of them is giving thought to the prospects of joint action. We shall learn much from our brethren in those countries, and I am happy to say that our committee will try to do its part in coming to a common understanding with them.

All such activities have their own importance and yet I come now to the point of saying that a still greater one may be within our reach. Before the members of our committee had even been appointed President Lashly wisely saw that we would need a means of consultation with official sources, and at his request a number of important men were designated as our advisers by the War Department, the Navy, the Department of Justice, and the Advisory Defense Commission. These gentlemen have met in conference whenever I have requested it, their help has been invaluable, and out of this experience has come the hope that a much broader action may be taken.

This hope rests upon two conclusions. The first is that we shall fail to do our duty if we do not contribute all the influence we can to the course of our national thought and action, but that we cannot know what to contribute unless we make a close and thoughtful study of what is actively going on in a government grown so complex and vast that no man can any longer retain a knowledge of it. Such a study I would call research in the living processes of the things we intend to defend. The same thing might be done in many of the States. The second conclusion is that even if we knew what we might contribute to the common good we would be foolish to attempt it independently without first inquiring how we might cooperate with agencies which are already in action.

The first step is to make the study. It will require the constant attention of several men for a period of weeks, and probably it will continue for a long time with a succession of volunteers who will pass the work on from hand to hand. Whatever the outcome the experiment is worth making, and our committee appeals to the bar for such volunteers. Our office in Washington is staffed and ready to begin.

Institutional Influences

By the institutional influence of the bar I mean to refer to fields which need only to be mentioned. We are hearing it eloquently said, by the Special Committee on Improving the Administration of Justice and by others, that the work of our courts and the legislatures, of administrative tribunals and of every agency for the making of rules and the accommodation of disputes, needs to be attended to with diligence, with conscientious skill, and with honor. We are an easy-going and a wasteful people, and we show those failings in many places besides the night club and the garbage pail. We have tolerated municipal corruption, patronage in the courts, spoils in legislation and every kind of inefficiency. In the present circumstances every evil in the body pol-

itic, whatever its cause or nature, is a weakness which imperils our defenses. To remedy these failings in every field of law and its administration, to maintain the free and lofty towers of our legal institutions, is a pressing duty of our profession. The Committee on National Defense, in its two capacities as clearing house and working force, holds itself ready to work with and to serve all other men whose hearts are in this battle.

Organized Bar as Public Agency

And so we come to what may be at once the greatest single function of the bar and the one which comprehends all the others, too, one which is philosophical and dynamic, inherent and yet largely unfamiliar, the function of the bar as a public agency. That there must be a professional body of citizens responsible for maintaining the laws of a free people is so fundamental and so vast a principle of our civilization that we do not often see it whole. It is easy for us to perceive objectively the relation of the medical faculty to our physical health, because even as laymen we can understand most of its prophylactic and curative procedures. Less often do we pause to consider how and why it is that in our scheme of things there must always be entrusted to men of the law like ourselves the duty to keep men's rights free of infection and the springs of justice flowing undefiled. If ever there comes into general use such an expression as Legal Hygiene it will be only a new and useful name for what has always been the method of free peoples.

The difficulties come, at a time like this, in devising ways and discovering men to organize and expedite what may be done by united effort, and even in trying to determine what should be organized at all. Each one of us, according to his powers and his conscience, his understanding of the state of affairs and of his own measure as a citizen, is clearing his personal decks and speeding up his engines. Many of us doubt, as some have always doubted, whether much organization of the bar is necessary. But as we see the steady preparation and the mounting resolve of our people to be ready for whatever our fate may be, as we come to realize that every useful element in our life must more than ever in our history contribute to our safety, we can recognize the fact that it is not the lawyers but the bar, the organized instrument of our profession, which the people regard as a public agency of justice and of freedom.

Every active lawyer is a student of history, of human nature and of practical affairs. We know beyond doubt or question that our way of life in this country and our plan of human action are better than any other in the world. We know that they were won for us by brave and clearsighted men who worked together, and who fought not as guerrillas but as an Army. More than other men we know how to get along with people, how to accommodate differences, how to get things done. More readily than others we can lay aside the disagreements which prick men into irritation, which break down unity and breed dissension. It is time that we put away our prejudices, our parochialisms, our sectarian and racial dislikes, it is time that we join up with the army of our brethren. Not alone will such action on our part produce its tangible results but the very fact that we are taking it will strengthen public courage.

For the bar *is* trusted by the people, and our only problem now is to deserve that confidence whatever may befall. In wisdom, in courage, in loyalty and self-sacrifice, let no one excel us. We cannot foretell what we may be called upon to do but let us be ready, for better than all other men in the world we know why we should do it. Let us be strong and wise and true, and we shall be trusted. Let us be brave and loyal, and we shall not lack for company. Let us trust each other and go forward together, come what may.

ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE—MAJORITY AND MINORITY REPORTS

THE Attorney-General's Committee on Administrative Procedure, appointed by Attorney-General Murphy in February of 1939 at the request of President Roosevelt, submitted its report last week to Attorney-General Robert H. Jackson, who made it public. The majority of the Committee, headed by Dean Acheson of Washington, D C., its Chairman submitted a voluminous report, extensive recommendations, and a bill to carry out such of its recommendations as it deemed susceptible of legislative remedy. A minority composed of Messrs. Carl McFarland, Assistant Attorney-General under Homer S. Cummings, Professor E. Blythe Stason of the University of Michigan, and Arthur T. Vanderbilt, former President of the American Bar Association, submitted "additional views and recommendations," with a specific bill to carry them out and also effectuate various of the objectives of the Walter-Logan bill, which failed of enactment late in the last Congress, pending the filing of this notable report. The Committee was thus unanimous as to the need for corrective legislation as to the administrative process and in submitting specific legislation for enactment.

This minority, however, found itself in the middle ground. Chief Justice Groner, of the Circuit Court of Appeals of the District of Columbia, concurred in the report of the minority as to treatment of matters covered; but in a separate statement he expressed emphatic views which went much beyond those of the minority report and bill.

The Majority Report

Dean Acheson and his colleagues base their conclusions upon the impressive studies and analyses made by the whole Committee, and the voluminous material compiled. The exhaustive review of the work and functioning of the numerous agencies is invaluable as source material and background. The majority state

thus their views as to "the boundaries of this Committee's work":

> The Committee has not concerned itself—it was not asked to concern itself—with the wisdom or efficacy of the legislation which is administered by the Federal agencies; nor with the wisdom or propriety of regulations promulgated by the agencies; nor with the correctness of their decisions in individual cases. It was not charged with the duty of studying the problems of selecting, training, and managing personnel in Government agencies.
>
> This Committee is concerned with the procedures and the procedural practices of the administrative agencies, and the general methods provided for judicial review of their decisions. Its task has been to make a thorough and comprehensive study of them to detect existing deficiencies and to point the way toward improvement.

Not all of the practices or faults discussed in the report are deemed by the majority to be remediable by legislation. The majority states as follows the purposes and scope of the bill which it appends to its report:

> In general, the proposed bill has four major purposes. The first is to create an Office of Federal Administrative Procedure, composed of a director appointed by the President with the advice and consent of the Senate, a Justice of the Court of Appeals of the District of Columbia, to be designated by its Chief Justice, and the Director of the Administrative Office of the United States Courts, who is appointed by the United States Supreme Court. Assisted by representatives of the agencies and of the public, the Director of the Office is to study and coordinate administrative procedures, and in general through continuing studies and periodical recommendations, to achieve and stimulate practical improvements in a manner not possible through omnibus legislation.
>
> Second, the Committee's proposed bill is intended to improve, without rigidifying, the rule-making process by emphasizing the importance of outside participation prior to the issuance of rules, and by permitting interested persons to petition for rules or for amendments. To assure general knowledge of a rule and to provide for timely objection by private interests, the bill proposes that in general no rule shall become effective until forty-five days after its publication. Further, an important recommendation in the bill is that full information concerning the structure, policies, procedures and interpretations of an agency be published and report thereof made to Congress.
>
> Third, the bill proposes to improve the process of formal adjudication by bringing about a more uniformly high quality of hearing officers. This is to be achieved by creating "hearing commissioners" with tenure, substantial salaries, full power to control and conduct hearings, and power to issue decisions of a considerable degree of finality. In order to assure that these hearing commissioners will be independent and of high calibre commensurate with their duties and powers, the bill proposes that they be appointed by the Office of Federal Administrative Procedure, after nomination by an agency and after the Office has investigated the nominee's qualifications. The bill proposes further that no hearing commissioner be removed before the expiration of his term except by the Office after hearing.
>
> Fourth, in order to impart certainty to the administrative process, and to aid individual citizens seeking an authoritative statement of their rights and duties, the bill proposes to authorize agencies to issue binding declaratory rulings.

The majority report discusses in trenchant fashion each of the principal phases of the subject, and will be examined with keen interest by lawyers and citizens concerned with administrative law. Lack of space prevents more extended quotation at this time. The majority also prefaces its bill with a vigorous statement of its reasons for rejecting the minority recommendations on the principal points of difference.

The Minority Report of Messrs. McFarland, Stason and Vanderbilt

The minority report stems also from the studies made by the whole Committee. Urging first "the separation of functions," the minority seeks adherence to the "governmental pattern" which English-speaking peoples "regard as the essence of fair adjudication." The practical difficulties inherent in trying to undo the "telescoping of functions" characteristic of the administrative agencies are stated and realistically discussed. The subject of "judicial review" is recognized as closely related to the separation of functions; the "deficiencies and uncertainties in present practice" as to judicial review are demonstrated, with the following recommendations:

> Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusions of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency.
>
> In the second place, Congress should classify types of cases and provide special degrees of review as to each. If, for example, Congress should feel that important issues arising under a regulatory statute, involving the limits of interstate commerce, should be protected by a closer judicial scrutiny than other issues, those issues could be singled out for review according to the "weight of evidence" or some other appropriate formula. On the other hand, and again to offer only a single example, if Congress should desire only a minimum of review of fact questions arising under employees' compensation legislation, these too could be singled out for special treatment.
>
> Without attempting to analyze the various types of cases and to formulate the proper standard of review to be applied to each, a few general observations may be made. First, though the judiciary cannot be expected to do the work of administration, it should be utilized to protect against clear error. The graver the possible effects of the error, the more searching should be the judicial power of review. Secondly, when discretionary power is validly conferred by Congress upon an administrative agency, the courts should not interfere in its exercise unless there is an obvious abuse of discretion. Thirdly, the courts should pay due attention to the fact that the decision under review has been rendered by a tribunal trained by experience to decide the questions at issue. Fourthly, since *manifestly* incorrect decisions by administrative agencies should not be permitted to stand, the "substantial evidence" rule, if it means a more

restricted review, should be clarified by more precise legislative language.

In view of existing deficiencies, we think it not sufficient to await and rely solely upon the benefits of a reorganization of subordinate administrative hearing officers and their procedure as recommended by the Committee, although such reorganization, if adequately directed by statute and faithfully carried out, will be productive of much good. It is unsatisfactory to the citizen and unfair to the courts to provide for judicial review without defining its scope. In effect the courts are asked to choose between themselves and other public agencies, they are asked to assume or deny themselves power of review, and they are made a party to the result of conflicting statutory interpretations. Under these circumstances, it is natural that the courts should lean backwards to deny themselves powers which Congress has not clearly conferred upon them.

Perhaps the minority's major dissentient recommendation is its plea for the enactment of a code of "legislative standards of fair procedure." In this connection, the minority said, in part:

> The significance of a reorganization of the hearing and decision process in the field of administrative justice is not to be minimized. A revision of the status and powers of hearing officers, such as the Committee suggests, involves a salutary change in the dynamics of the system. It aims at responsibility and simplicity, where anonymity and formlessness now exist. It enables parties to come face to face with an officer who is to hear, and decide in the first instance, any contested case. It necessarily aims at recruiting competent and independent officers for this purpose, without unduly dividing responsibility for the execution of public policy. Our point is, however, that it is insufficient merely to provide the means for the reorganization of the present process—it requires also the express legislative statement of a number of directions or standards as to the operation of that reorganized process.
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> * * *
>
> Without impairing government, a legislative statement of principles will go far toward dispelling the cloud that hovers over the administrative process. It will guide administrators and protect the citizen far more than the judicial review of particular administrative cases, which is available only to those few who can afford it. What is needed is not a detailed code but a set of principles and a statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.
>
> Such a statement would be of invaluable assistance to the private persons on whom powers of government impinge, for they could learn more readily and clearly when, where, and how to proceed. Greater cooperation with government officials would be assured. It would be of inestimable value to government itself by helping to alleviate the disrespect, distrust, and fear now felt by too large a percentage of citizens. Finally, there is reason to believe that administrative officials would welcome the assistance of general procedural instructions which, instead of leaving them groping in the dark, would furnish a pattern of action.
>
> A judge is surrounded by an elaborate and traditional system, but an administrator is often plucked from private pursuits and given scant direction. Old evils cannot be corrected in a season, yet the statutes assume that all must be made different over night. In short, the administrator is given an impossible though a necessary task. He must have direction, for he has no established practice to guide him. He must have a staff and auxiliary powers because he has no grand jury, state's attorney, or police to aid him. He must have discretion to organize and manage his job, because the pressure of events has allowed Congress no time to organize it for him. Within broad limits his judgment must be honored because existing appellate tribunals have been organized for, and are busy with, different tasks. Such direction and such aid can be given or authorized only by Congress.

Proposals for Legislation

Upon each of its points of difference, the minority brought forward its recommendations in the form of specific provisions in its proposed bill. Included in that category is its proposed code of fair legislative standards for the conduct of quasi-judicial proceedings by administrative agencies, which code resembles in part a canon of ethics, such as those promulgated for the conduct of judges and lawyers.

The minority bill accepts and carries in the proposals of the majority bill, adopts or adapts various provisions of the Walter-Logan bill, and supplements those by adding the specific suggestions of the minority for more comprehensive legislation. Among the more important provisions thus accepted from the majority bill are those which would give considerable independence of status, tenure, powers and functions, to the "hearing commissioners" proposed to take the place of "trial examiners" subordinate to the agency. The setting up of an Administrative Office to correlate and supervise the functioning of the agencies—along lines corresponding to the Administrative Office of the Courts of the United States, with an actual tie-in to the Federal judicial system—is also supported by the minority as well as the majority.

The above proposals are substantially along lines which were approved in principle by the House of Delegates in Philadelphia last September, through favorable action on the following recommendation reported from the Committee on Labor, Employment and Social Security (related in terms to the National Labor Relations Board but offered as a contribution to current consideration of improvement in administrative law):

> That the Association recommends that the Trial Examiners of the National Labor Relations Board should be chosen as a result of special civil service examinations as to their experience, training, and qualifications for the impartial weighing and findings of fact; that such Trial Examiners should not be selected by the Board itself, but through appointment by the Administrative Office of the Courts of the United States or by the Circuit Court of Appeals of the District of Columbia, or through appointment by the President with the advice and consent of the Senate; and that the report and findings of such a Trial Examiner, when rendered after due hearing according to law, should in all subsequent proceedings in the particular matter be given the status and weight of the report and findings of a special master in the District Courts of the United States.

Subsequent issues of the JOURNAL will contain further summaries and expositions of the majority and minority reports on the important issues involved.

AMERICAN BAR ASSOCIATION
JOVRNAL

MR. JUSTICE McREYNOLDS

President Wilson appointed his Attorney General, James C. McReynolds, Associate Justice of the Supreme Court of the United States in August, 1914. His resignation now terminates a tenure of that high office longer than any other of the present members of that Court.

On January 20, his last day on the bench, Mr. Justice McReynolds delivered the opinion of the court in *Frost v. Coeur D'Alene Mining Corporation* holding that the essential purpose of the statutory requirement for the registration of stock with the Securities Exchange Commission was the protection of investors, and that the courts could not, at the instance of parties to a particular sale, add to the express penalties of the act, others not there enumerated, particularly if, as suggested by counsel for S.E.C., the imposition of those penalties, might frustrate the purpose of the act.

At the same session of the Court he joined with the Chief Justice in the dissenting opinion of Mr. Justice Stone in *Hines v. Davidowitz*, (the "Alien Registration Act" case) and with the Chief Justice and Mr. Justice Stone, in *Beal v. Missouri Pacific R R Co.*, (the "Full Train Crew" case) he concurred in an expression of opinion that the judgment reversed should be remanded for further proceeding in the district court rather than with instructions to dismiss.

And so the last day of a long and honorable career is seen to have been a busy day, devoted to the conscientious discharge of important responsibilities.

The JOURNAL ventures to express the hope that on the tee, the fairway and the green; in the woods, on the waters, in the blind; and with steady hand on the tiller or the steering wheel, Mr. Justice McReynolds may find even more happiness than he experienced in that stately building, which he once compared to the "Temple of Karnak."

FEDERAL RULE 35

The Supreme Court has sustained the new federal rule authorizing the district courts to order a party to an action to submit to examination by a physician appointed by the court for that purpose, where the physical or mental condition of the party is in controversy.

The prevailing opinion written by Mr. Justice Roberts deals with questions of vital importance.

It was held that the rule deals with procedure and that it is therefore within the authority conferred upon the court by the rules Enabling Act of June 19, 1934.

Although the case was decided by a divided court, there was no division or dissent on the proposition that the rule deals with procedure and not with substantive law.

The prevailing opinion deals also with the consequences of the submission of the rules to Congress in accordance with the provision of the enabling act.

In a note to the opinion Mr. Justice Roberts pointed to the numerous cases in which a similar legislative provision had been employed in order that Congress might be assured of an opportunity of examining legislative action and administrative rules before they went into effect and might take appropriate legislative action if the delegated power had been exercised in a manner which Congress might consider to be against the public interest.

It was therefore held that the rules had the effect of a federal statute, and that the district courts are no longer bound to follow state statutes or rules in matters of procedure.

Counsel for plaintiff admitted that Rule 35 was procedural in character. Their attack upon the rules was based upon the provision of Section 1 of the enabling act that the rules should neither abridge, enlarge, or modify the substantive rights of any litigant. They interpreted the phrase "substantive rights" to mean substantial and important rights of a litigant. Here was the crucial point in this controversy. Mr. Justice Roberts pointed out that if those words were given that interpretation the rules would be involved in "confusion worse confounded".

The prevailing opinion therefore establishes the principle that the test of the validity of any of the rules of civil procedure is whether or not it deals with procedure, and that term was defined as "the judicial process for enforcing rights and duties recoghized by substantive law and for justly administering rem-

edy and redress for disregard or infraction of them."

The dissenting opinion by Mr. Justice Frankfurter is based upon his view that a change in procedure of such importance is on a very different footing from other procedural provisions and should not be put in force without explicit legislation.

Mr. Justice Frankfurter expressed his reluctance to register dissent but it is gratifying to observe that the dissent was carefully limited to the particular under consideration and that there was in reality unanimity as to the right of the legislature to restore the ancient rule-making power to the judicial department.

THE DEFENSE COMMITTEE GIVES ACTIVE AID

Selective Service Circular No. 2, a ninety-page pamphlet printed and widely distributed in January by the Government of the United States under its "frank," is "A Manual of Law for Use by Advisory Boards for Registrants" under the Selective Training and Service Act of 1940. With satisfaction, members of the Association serving with draft boards and appeal boards noted that this important official publication bears the imprint

"Compiled by the Comitttee on National Defense of the American Bar Association."

Such a brochure was of course vital to the administration of the Selective Training and Service Act. It is a specific and tangible evidence of the expert and many-sided assistance which the organized Bar throughout the country, under the leadership of the American Bar Association and its Committee, is giving to the urgent tasks of National preparedness for defense.

GREAT ISSUES AS TO ADMINISTRATIVE PROCEDURES

In the presence of grave international issues, the lawyers and people of America should not fail to give heed also to the momentous issues which are brought to the point of decision through the epoch-marking reports late in January, by the majority and minority reports from The Attorney-General's Committee on Administrative Procedure. They are monumental in character and momentous in their significance and usefulness. Although dealing with the structure of the administrative agencies, the elements of their fair procedure, and the processes and scope of judicial review, the majority and minority reports alike go deeply into the substance of the rights of citizens and the realities of protecting those rights. Elsewhere in this issue, we undertake to give somewhat of a summary and review of salient points of these reports, but no lawyer should fail to obtain also a copy of the reports and thereby form at first hand his opinion as to the merits of the issues upon which the reports show an accord and the issues upon which they disclose a deep-rooted difference.

When the Walter-Logan bill failed of enactment in December, through veto by The President, it was said by many persons familiar with the legislative situation that agreement on the provisions of an adequate bill was to be worked out, early in the new Congress, with assurance that it would become law. The President pointedly expressed, in his veto message, the desire "to make the [administrative] process more workable and just and to avoid confusions and uncertainties and litigations." One of the reasons given for denying enactment to the Walter-Logan bill in December was that the report and recommendations from the two years of intensive study by The Attorney-General's Committee might first be received and considered. Before entering upon discussion of well-stated points of earnest difference between the majority and the minority, all who are interested in the subject should hail and herald gratefully the fact that there is now available a monumental and classic study of the administrative agencies in America, and that the material is fully in hand for perfecting the imperative legislation and coming to an informed conclusion as to its desirable scope, substance and form.

The outstanding fact as to the reports by this Committee, constituted by Attorney-General Murphy early in 1939 at the request of The President, is that no voice is raised, no opinion is expressed, in favor of withholding legislation and leaving matters as they have been and are. From sources altogether friendly to the administrative agencies comes frank recognition that there are conditions which call for legislative correction. The majority, headed by Dean Acheson, presents a wealth of material, supplementing the Committee's preliminary brochures, all of which lead the majority to the opinion that there is need for substantial improvement and for comprehensive legislation to that end. Indeed, the majority has put into the form of a definitive bill (comprising some twenty-nine sections, some of them with lengthy sub-sections) "those of its principal recommendations for improvement in the administrative process which it believes to be susceptible of legislative treatment." The minority report by Messrs. Arthur T. Vanderbilt, Carl McFarland, and E. Blythe Stason, opens by justly stating that the majority report "represents a composite of studies, views and recommendations which, if carried

out, would go very far toward effecting major improvement."

Accepting "the main outlines of the majority report," Messrs. Vanderbilt, McFarland and Stason, add "further views and recommendations in order to secure, as we see it, a more adequate solution of present difficulties." In main outline, the minority view is that "the three principal topics with respect to which, in our judgment, the report or recommendations fall short are: (1) The separating of prosecuting and judicial functions; (2) The scope and practice of judicial review; and (3) The need for a legislative statement of standards of fair procedure." Lawyers and citizens will freely recognize that these comments, if fully supported, call for the closest consideration of the divergences between the two reports. The minority also attaches to its report a definitive bill, which carries in the accepted features of the majority bill, and was prepared also with full consideration of the Walter-Logan bill and with the aid of the debates had as to it.

Chief Justice Groner of the Court of Appeals submits also a "separate statement," in which he says that "Because the statement of views in behalf of Messrs. McFarland, Stason and Vanderbilt, in my opinion, gives an accurate and realistic account of existing deficiencies and more clearly points the way to improvement, I have joined in its recommendations though I am unable to agree that the proposed legislation sponsored by either group is entirely adequate", while either of the proposed bills "would accomplish a decided improvement over present conditions." Principally, Chief Justice Groner makes an earnest and moving plea for "complete separation of the functions of prosecutor and judge in administrative procedure" and for such thorough-going legislation as will carry that separation into full effect, so as to grant and ensure "that which it is the fundamental right of the citizen to have—an open, fair and unbiased determination of his rights when charged by the government with violation of a regulatory statute."

It is not practicable to analyze and discuss in the present editorial the vital differences between the submitted bills. For the present, we point out that clearly these reports contain the data, reasoned recommendations and careful draftsmanship, which should facilitate and assure the early enactment of an adequate law, in view of the admitted and demonstrated need for such legislation. Members of the American Bar Association of course give acclaim and support to those who have been steadfast for the basic objectives long sought by this Association and urged by its representative House of Delegates. At the same time, this Association has been intent on accomplishing administrative reform, rather than pride of authorship or the adoption of particular forms of words or details of method. If the Walter-Logan bill stopped short of full coverage of abuses, it blazed the way for attack on them. The Walter-Logan bill sought uniformity in procedure so far as practicable, but strove also for standards of inherent fairness and sense of justice, canons such as are instinctive in the conduct of impartial judges and right-minded lawyers. The Walter-Logan bill tried to give to individual citizens available ways of escaping the impact of arbitrary and biased decisions, based on "mere sorting out of the evidence" to support preconceived views. It proposed to submit the agencies to some systematic and independent supervision, and to provide ways and means of keeping their rulings within the boundaries of their delegated powers.

These and other sound objectives, for which the Association has led the fight for many years, are now brought to the stage where their legislative accomplishment, in a suitable and well-considered form, should not be longer resisted or delayed. To join with others who seek to help in that endeavor the Association is staunchly pledged. The imminence of vast tasks of National preparedness for defense, with the shifts and concentrations of power which are inevitable in those respects, makes it all the more important that in the structures and procedures of the previously established administrative agencies affecting the lives and the work of citizens, the substantial improvements and safeguards which are confirmed and fortified by these reports shall speedily be enacted.

The whole Committee and its staff deserve the thanks of the Bar for their prodigious labor and the invaluable results. The report and bill of the majority will not lack for active sponsors; lawyers should see to it that full and equal consideration be given to the impressive pleas of the minority, lest the vital issues which they raise be obscured against the back-drop of world events. Future issues of the JOURNAL will deal with other significant phases of the reports and will continue to present fairly the reasoned views of those intent on solution of the problems of the administrative process.

ARTICLES IN THE JOURNAL

As it is the policy of the JOURNAL to provide, within practical limits of space, a forum for the free expression of the views of members of the Association on matters of importance to the profession and the public, and as a wide range of opinion elicits a representative expression of the varying views, the Association and the Board of Editors of its JOURNAL assume no responsibility for the views stated in signed articles, beyond expressing by the fact of publication a judgment that the contents of the article merit consideration by our readers.

Editorially the JOURNAL supports the policies and objectives of the Association as from time to time duly determined. The views expressed are not necessarily those of each member of the Board of Editors.

REVIEW OF RECENT SUPREME COURT DECISIONS

By Edgar Bronson Tolman*

Federal Procedure—Rules 35 and 37 F. R. C. P.

Rule 35 of the Rules of Civil Procedure for the District Courts of the United States is valid and authorizes the district courts to order parties to an action in which mental or physical condition of a party is in controversy to submit to a physical or mental examination by a physician.

Disobedience of an order to submit to such an examination subjects the disobedient party to all the appropriate sanctions of Rule 37 (b) (2) except arrest.

Sibbach v. Wilson & Co., —— Adv. Op. ——; —— Sup. Ct. Rep. ——, U. S. Law Week 4131 (No. 28, decided January 13, 1941).

Petitioner (plaintiff below) brought an action in the District Court for Northern Illinois to recover damages for bodily injuries inflicted in Indiana. Respondent (defendant below) answered denying the allegations of the complaint and moved for an order requiring plaintiff to submit to a physical examination by a physician to be appointed by the court to determine the nature and extent of her injuries. The court granted the motion and ordered plaintiff to submit to an examination by a physician so appointed.

Plaintiff refused to comply and defendant obtained an order to show cause why the petitioner should not be punished for contempt. Plaintiff challenged the authority of the court, asserting that the order was void. The courts of Indiana, the state where the injury was inflicted, held such an order proper, whereas the courts of Illinois, the state in which the trial court sat, held that such an order cannot be made. Neither state has any statute governing the matter.

The district court adjudged the plaintiff guilty of contempt and directed that she be committed until she should obey the order or be legally discharged from custody.

Plaintiff appealed and the Circuit Court of Appeals, Seventh Circuit, decided that Rule 35 which authorized an order for physical examination in such a case, was valid, and affirmed the judgment. Certiorari was granted because of the importance of the question involved.

The Supreme Court sustained the validity of the rule but held that it could not be enforced by arrest.

The opinion of the Court was delivered by Mr. Justice Roberts. He first set out in his opinion the relevant portions of the Act of June 19, 1934, under the authority of which the rules of civil procedure were promulgated, and the relevant portions of Rules 35 and 37.

The contention of the plaintiff was stated to be, in final analysis, that rules 35 and 37 are not within the mandate of Congress. On this point Mr. Justice Roberts said:

> Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.
>
> Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure.

As to the "Conformity Act" and the "Rules of Decision Act" Mr. Justice Roberts said:

> Whatever may be said as to the effect of the Conformity Act while it remained in force, the rules, if they are within the authority granted by Congress, repeal that statute, and the District Court was not bound to follow the Illinois practice respecting an order for physical examination. On the other hand if the right to be exempt from such an order is one of substantive law, the Rules of Decision Act required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose, and to order the examination. To avoid this dilemma the petitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure. She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates "substantive" into "important" or "substantial" rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934.

The plaintiff relied on two former decisions of the Supreme Court (the *Botsford* case, 141 U. S. 250 and the *Stetson* case, 177 U. S. 172). But the Court declared that those cases in reality sustain the validity of the rules. In the *Botsford* case the right to compel a physical examination of the person had been denied because there was neither state nor federal statute granting the right. Mr. Justice Roberts called attention to the fact that there was in the *Botsford* opinion "no suggestion that the question was one of substantive law" and that there was an implicit acknowledgment that a statute of the United States authorizing an order of court for physical examination would be valid and that the matter was there treated as one of the procedure; that the Court there declared "that the question was not one of the law of Indiana but one of the law of the United States," and that the Federal statutes by their provision as to proof in actions at law "precluded the application of the Conformity Act"; that this again was a recognition that the matter is one of procedure, for both the Conformity Act and the mode of proof act deal solely with procedure.

In the *Stetson* case the Supreme Court sustained the power of the district court to order the examination because there was a statute of New Jersey authorizing an examination of the person.

Mr. Justice Roberts noted that in the *Stetson* opinion reference was made to the "Rules of Decision Act" but that notwithstanding that reference the discussion went upon the assumption that the matter was procedural. He also pointed out that in the *Stetson* case the distinction between substantive and procedural law was immaterial for the cause of action arose and the trial was had in New Jersey.

*Assisted by James L. Homire and Leland L. Tolman.

Closing the discussion of those cases, MR. JUSTICE ROBERTS said:

> In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the *Botsford* nor the *Stetson* case is authority for ignoring it.

Plaintiff had also relied upon *Slack v. N. Y.*, etc. RR., 177 Mass. 155. Of that case MR. JUSTICE ROBERTS said that the *Botsford* case was cited and followed because the common law practice did not warrant the entry of any such an order and because in the absence of a Massachusetts statute it was declared that it was for the legislature rather than the courts to alter the practice. In applying the reasoning of those cases to the case at bar, he declared:

> But if Rule 35 is within the authority granted, the federal legislature sanctioned it as controlling all district courts.

MR. JUSTICE ROBERTS then dealt with the contention of the plaintiff that the phrase "substantive rights" in the enabling act of June 19, 1924, meant "important and substantial rights theretofore recognized." He propounded the question; "recognized where and by whom" and showed by reference to the cases cited in the Advisory Committee's notes to the rule that the state courts are divided as to the power in the absence of statute to order physical examination; that in a number of states such an order is authorized by statute or rule, and that the rule in question accords with the procedure now in force in Canada and England. He declared that the asserted right is no more important than many others enjoyed by litigants before the Federal Rules of Civil Procedure "altered and abolished old rights and privileges and created new ones in connection with the conduct of litigation."

On this subject he declared:

> If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

He declared that "no invasion of freedom from personal restraint attached to refusal so to comply" because of the fact that a litigant need not resort to the federal courts unless willing to comply with the rule.

Counsel for plaintiff had urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. To which he replied:

> The authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy.

Calling attention to the fact that in accordance with the act the rules were submitted to the Congress the opinion says:

> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. The Preliminary Draft of the rules called attention to the contrary practice indicated by the *Botsford* case, as did the Report of the Advisory Committee and the Notes prepared by the Committee to accompany the final version of the rules. That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.

In a note to this portion of the opinion MR. JUSTICE ROBERTS illustrated the purpose and effect of the requirement in the Act of May 18, 1934, that the rules should be submitted to Congress and not go into effect until the end of the session, by calling attention to numerous instances in the organic acts applicable to some of the territories before their admission to statehood, which provided that the laws passed by the territorial legislatures should be valid unless Congress disapproved. He also pointed to similar provisions of the Reorganization Act of 1939.

Although the validity of the rules was sustained and although there was no error assigned either in the court of appeals or in the Supreme Court challenging the power to arrest and confine the person of the disobedient litigant for failure to comply with the order for submission to a physical examination, and although counsel on both sides in their brief and argument confined themselves to the discussion of the validity of the rule, the Court declared:

> We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it. Section (b) (2) (iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available under the rule in such a case are those enumerated in Section (b) (2) (i), (ii) and (iii).

For that error the judgment was reversed and the cause remanded to the district court for further proceedings in conformity to this opinion.

MR. JUSTICE FRANKFURTER filed a dissenting opinion in which MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concurred.

He declared his belief that even though the rule pertained to procedure he regarded it as subject to the limitation of the act that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." He therefore considered the doctrine of the *Stetson* and *Botsford* cases as not modified by the act and emphasized the holding of MR. JUSTICE HOLMES on behalf of the Supreme Judicial Court of Massachusetts in *Stack v. New York*, etc. RR., *supra* that "the common law was very slow to sanction any violation of or interference with the person of a free citizen." On this point he said:

> I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation.

He declared that even though the disobedience of an order under that rule cannot be punished as for contempt, it must still be considered as compulsive in that "the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination."

He expressed the view that the fact that the rules had remained on the table of the two Houses of Congress without evoking any objection to Rule 35 does not make them acts of Congress and that they cannot be treated as such and that to make the drastic change

that rule 35 sought to introduce would require explicit legislation.

Closing his dissenting opinion MR. JUSTICE FRANKFURTER said:

> Ordinarily, disagreement with the majority on so-called procedural matters is best held in silence. Even in the present situation I should be loath to register dissent did the issue pertain merely to diversity litigation. But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.

The case was argued for the plaintiff by James A. Velde (Lambert Kaspers and Royal W. Irwin with him on the brief); Mr. J. F. Dammann argued the case for the defendant (K. F. Montgomery and Wilson & McIlvaine with him on the brief).

William D. Mitchell filed brief as *amicus curiae*.

The "Rule of Decisions Statute"—State Law in Federal Courts—Changes in State Law Pending Appeal

The duty rests upon federal courts of review to apply under the Rule of Decisions statute, the state law in force while the case is under review. If the case was decided below in accordance with a decision of the highest court of the state then in force, and if during the pendency of the appeal that decision is changed by a later decision of the highest state court, the reviewing federal court will follow the later decision.

Vandenbark v. Owens-Illinois Glass Company, 85 Adv. Op. 317; 61 Sup. Ct. Rep. 347; U. S. Law Week, 4112. (No. 141, decided Jan. 6, 1941.)

Plaintiff, an employee, sued defendant, her employer, in the District Court of the United States for the Northern District of Ohio, alleging that through the negligence of defendant she had contracted various occupational diseases, including silicosis. Plaintiff was a citizen of Arizona, defendant was an Ohio corporation.

On motion of defendant the trial court dismissed the suit on the ground that plaintiff had stated no grounds for relief. At the time of the dismissal the Ohio courts had consistently construed the Ohio constitution and statutes as withdrawing the common law right and denying any statutory right to recovery for plaintiff's occupational diseases.

After the dismissal the Ohio Supreme Court reviewed its former decisions and in an opinion expressly overruling them declared occupational diseases such as complained of by plaintiff compensable under Ohio common law.

Plaintiff brought the case to the circuit court of appeals, sixth circuit, and that court held that the case was ruled by the state law as declared by the states highest court when the judgment of the trial court was entered, and not by the state law as so declared at the time of entry of the appellate court's order of affirmance or reversal. The Supreme Court granted certiorari because its former decisions had not removed uncertainty on the question here involved.

The opinion of the Court was delivered by MR. JUSTICE REED. It was pointed out that in the *Erie Railroad* case there had been no change in state decision between the accident and the judgment on review, and no occasion there to deal with the question here involved, but as so often happens this point which seemed to be new was found to be governed by the analogy of cases which long preceded the *Erie Railroad* case. The learned Justice quoted with approval from *Burgess v. Seligman* (107 U. S. 20, 23) as follows:

> So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued.

He declared that the true rule to guide a federal court where there had been a change of decision in state courts subsequent to the judgment of the district court has been well stated long ago in *U. S. v. Schooner Peggy* (1 Cranch 103, 110) as follows:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

Many other cases were cited and analyzed and the analogies of those cases were applied to the question under discussion as follows:

> These instances indicate that the dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.

Counsel for defendant had earnestly pressed upon the Court the desirability of applying the rule that appellate courts should review a judgment only to determine whether or not it was correct when made; that any other review would make the federal courts subordinate to state courts and their judgments subject to change of attitude or personnel of state courts, to which reply was made as follows:

> While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.

The judgment was reversed.

MR. JUSTICE MCREYNOLDS concurred in the result.

MR. JUSTICE STONE took no part in the consideration or decision of the case.

Paul D. Smith and Thomas D. Sutherland argued the case for the plaintiff below.

Lawrence E. Broh-Kahn argued the case for defendant, (with him on the brief, Lloyd T. Williams).

Labor Law—National Labor Relations Act—Collective Bargaining—Judicial Review of Findings of the Board

The National Labor Relations Board has power to disestablish an employees' union organized with the cooperation of the employer and not solely the result of the employees' free choice. Findings of the Board sustained by the Circuit Court will not be disturbed if there was evidence to support the findings. Orders of the Circuit Court refusing to enforce board's findings and orders, will be reversed by the Supreme Court if there was evidence to support the Board's findings. Congress entrusted the Board, not the courts, with the power to draw inferences from the facts and the Board has the function of appraising conflict-

ing circumstantial evidence and the weight and credibility of testimony.

National Labor Relations Board v. Link Belt Co.; same v. Independent Union of Craftsmen, 85 Adv. Op. 325; 61 Sup. Ct. Rep. 358; U. S. Law Week 4102, (Nos. 235, 236, decided January 6, 1941).

This is a proceeding under Section 10 of the National Labor Relations Act for the enforcement of an order of the National Labor Relations Board requiring an employer to cease and desist from domineering, or interfering with a labor organization, to withdraw recognition from it as a collective bargaining representative of employees, and directing the employer to reinstate or make whole certain employees against whom the Board had found the employer had discriminated because of their union membership and activities. The order of the Board was enforced in part by the Circuit Court of Appeals but as to a portion of the findings and orders the Circuit Court refused enforcement on the ground that they were not "supported by evidence" as required by Section 10 (e) of the Act. The Supreme Court brought the case before them by certiorari because of the importance in an orderly administration of the Act that the findings of the Board as to the facts "if supported by evidence shall be conclusive."

The opinion of the Court was delivered by MR. JUSTICE DOUGLAS and by far the greater part of the opinion consists of an exploration of the question whether or not the findings of the Board were so supported.

The controversy involved two rival labor organizations of the Link Belt Co. (hereinafter called the "employer"). The two organizations were a company union, generally referred to in the opinion by the abbreviated name "Independent," and an organization affiliated with C.I.O., referred to in the opinion as the "Amalgamated."

A fundamental principle of law applicable to the case was stated by MR. JUSTICE DOUGLAS in the following language:

> An "inside" union, as well as an "outside" union, may be the product of the right of the employees to self-organization and to collective bargaining "through representatives of their own choosing," guaranteed by § 7 of the Act. The question here is whether the Board was justified in concluding that Independent was not the result of the employees' free choice because the employer had intruded to impair their freedom.
>
> We think it was.

A careful review of all the evidence bearing upon the power of the Board to disestablish "Independent," led to the conclusion that there was evidence sufficient to support the finding and order of the Board on that point, and the applicable law was stated as follows:

> The court below was unable to find any evidence from which it could be inferred that the employees did not, with complete independence and freedom from domination, interference or support of the employer, form their own union. But we are of the opinion that the Court of Appeals in reaching that conclusion substituted its judgment on disputed facts for the Board's judgment —a power which has been denied it by the Congress. . . .
>
> Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts.

The Circuit Court had rejected the finding of the Board that certain employees had been discharged in violation of the Act because of their activity in behalf of "Amalgamated." The evidence bearing upon that question was examined at length and the conclusion of the Court was stated as follows:

> On this state of the record we think that the Board was justified in concluding that Kalamarie was in fact discharged because of his activities for Amalgamated.

The judgment of the Circuit Court of Appeals was reversed and the case remanded to that court with directions to enforce the Board's order in full.

MR. JUSTICE MCREYNOLDS took no part in the consideration or disposition of the case.

Robert B. Watts argued the case for National Labor Relations Board; Henry E. Seyfarth argued the case for Link Belt Co., Benjamin Wham for Independent Union of Craftsmen.

Labor Law—Unfair Labor Practice—Refusal to Sign Contract

A finding of the National Labor Relations Board that the petitioner has been guilty of unfair labor practices will not be disturbed on review when supported by evidence. That Board has authority to disestablish a labor union in whose organization petitioner has interfered. The refusal of an employer to sign a written agreement embodying the terms concerning wages, hours and working conditions reached by the employer and employees, is an unlawful labor practice.

Heinz Co. v. National Labor Relations Board, 85 Adv. Op. 303; 61 Sup. Ct. Rep. 320; U. S. Law Week 4118, (No. 73, decided Jan. 6, 1941).

This is a proceeding brought by the National Labor Relations Board in the Court of Appeals for the Sixth Circuit to disestablish a plant labor organization (hereinafter called "Association") and to recognize and bargain collectively with a labor organization affiliated with A. F. of L., (hereinafter called "Union") and to compel employer to sign a written contract embodying the terms of an agreement between employer and the union. The Circuit Court confirmed the findings of the Board and ordered compliance with the Board's orders without modification. Certiorari was granted because of the public importance in the administration of the Labor Act of the questions involved and the judgment affirmed. The opinion of the Court was delivered by MR. JUSTICE STONE.

Far the greater part of the opinion consisted of a review of the evidence in order to determine whether or not the findings and orders of the Board were supported by evidence. It appeared from the opinion that there was little doubt that the plant union had been favored and the outside union disparaged and discouraged. The real question was whether the employer was responsible for those unfair labor practices. It was held that there was such knowledge on the part of the employer, of the action of subordinates that the finding of the Board had substantial support in the evidence. On this point MR. JUSTICE STONE said:

> The question is . . . whether the act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of the kind which the act prescribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them

upon the employees' right of self-organization, quite as much as if he had directed them. . .

We think there was adequate basis for the Board's order prohibiting petitioner, its officers and agents, from interfering with the exercise of its employees' rights of self-organization or with the administration of the Association or contributing to its support.

Next for consideration came the evidence in relation to the grounds supporting the order disestablishing the Association. On this point MR. JUSTICE STONE said:

Disestablishment is a remedial measure under § 10 (c) to be employed by the Board in its discretion to remove the obstacle to the employees' right of self-organization, resulting from the continued or renewed recognition of a union whose organization has been influenced by unfair labor practices. Whether this recognition is such an obstacle is an inference of fact to be drawn by the Board from all the circumstances attending those practices.

The employer had argued that since it had finally recognized the union it should be equally free to recognize the Association instead of the union, whenever the former represents a majority of the employees, but the Court rejected this contention on the ground that the Board had the right to consider, as it did, the conduct of the employer in failing to repudiate the action of its supervising employees in the unlawful labor practices referred to, from which the belief was justified that the employer would continue to favor the Association rather than the union and on this point the Court said:

From this and other circumstances disclosed by the evidence, the Board inferred, as it might, that the influence of the participation of petitioner's employees in the organization of the Association had not been removed and that there was danger that petitioner would seek to take advantage of such continuing influence to renew its recognition of the Association and control its action. This we think afforded adequate basis for the Board's order.

The final point discussed was the employers' refusal to sign a written agreement. The finding of the Board on this point was sustained by reference to the history of the collective bargaining process showing that the signature of a written contract had always been considered a recognition of the union and a permanent memorial of the terms of the contract. It was urged that experience had shown that a refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process and had approved a fruitful source of dissatisfaction and agreement. Reference was had to the legislative history of the National Labor Relations Act as shown by House and Senate reports and the provisions of previous acts and the historical argument was summarized in the following language:

We think that Congress, in thus incorporating in the new legislation the collective bargaining requirement of the earlier statutes included as a part of it, the signed agreement long recognized under the earlier acts as the final step in the bargaining process. It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement. But it does not follow, as petitioner argues, that, having reached an agreement, he can refuse to sign it, because he has never agreed to sign one.

The natural inference to be drawn from such a refusal was illustrated by the following statement:

A business man who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith.

The final conclusion of the Court was stated as follows:

Petitioner's refusal to sign was a refusal to bargain collectively and an unfair labor practice defined by § 8(5). The Board's order requiring petitioner at the request of the Union to sign a written contract embodying agreed terms is authorized by § 10(c). This is the conclusion which has been reached by five of the six courts of appeals which have passed upon the question.

The judgment of the Circuit Court of Appeals was affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration of disposition of this case.

Mr. Earl F. Reed argued the case for Heinz Co.; Mr. Charles Fahy, Assistant Solicitor General, argued the case for respondent.

Criminal Law—Federal Statutes—Espionage Act of June 15, 1917

The Anti-Espionage Act of 1917 embraces and punishes the obtaining from a government employee out of government files and records, reports concerning the movements of foreign military and civil officials, private citizens, movements of fishing boats suspected of espionage and the taking of photographs of American war vessels.

The offenses mentioned in the act are not necessarily limited to those committed at the places and from the sources mentioned in the act. It is sufficient if the documents or other things are "connected with" or "relating to" national defense.

National defense as used in the Espionage Act is a generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness.

Whether the acts of the accused were connected with or related to the national defense is a question properly left to the jury.

Gorin v. United States and *Salich v. United States*, 85 Adv. Op. ——, 61 Sup. Ct. Rep. ——, U. S. Law Week 4128 (Nos. 88, 89, decided January 13, 1941).

Gorin, Salich and the wife of Gorin were indicted for violation of the Espionage Act of June 15, 1917. The indictment contained three counts. The first charged violation of Section 1(b) by obtaining documents "connected with the National Defense." The second charged violation of Section 2(a) in delivering and inducing the delivery of those documents to the petitioner Gorin, the agent of a foreign nation. The third charged violation of Section 4 by conspiracy to deliver them to a foreign government and its agent. The wife of Gorin was acquitted on all three counts. The defendants, Gorin and Salich, were found guilty on each count. Gorin was sentenced to the penitentiary for six years, Salich for four years, and each of them fined $10,000. On certiorari, the Supreme Court affirmed.

The proof indicated that Gorin, a citizen of the union of the Soviet Socialist Republics, acted as its agent in gathering information. He sought and obtained from Salich, for substantial pay, the contents of over fifty reports relating chiefly to Japanese activities in the United States. Salich, a naturalized Russian born citizen, was a civilian investigator for the Naval Intelligence Branch Office at San Pedro, California. The reports detailed the coming and going on the west

coast of Japanese military and civil officials and certain private citizens, the movements of fishing boats suspected of espionage and the taking of photographs of American war vessels.

Judgment was entered on the verdict, the defendants appealed to the Circuit Court of Appeals, Ninth Circuit. There the judgment of the district court was affirmed and the case was taken to the Supreme Court on the ground that the scope of the act and its constitutionality as construed were questions of importance in enforcing the criminal statute.

The opinion of the Court was delivered by Mr. JUSTICE REED.

The first two objections raised by the defendant are summarized by the Court as follows:

> Petitioners object to the convictions principally on the grounds (1) that the prohibitions of the act are limited to obtaining and delivering information concerning the specifically described places and things set out in the act, such as a vessel, aircraft, fort, signal station, code or signal book; and (2) that an interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the act unconstitutional as violative of due process because of indefiniteness.

It was declared that the philosophy behind these objections was "the traditional freedom of discussion of matters connected with national defense which is permitted in this country," and it was urged that the terms "connected with" or "relating to" national defense should be interpreted so as

> "to make it a crime only to obtain information as to places and things specifically listed in Section 1, as connected with or related to the national defense,"

and that the statute should not be construed so as to leave to a jury the determination of whether the information obtained was "connected" with national defense.

Defendants relied upon the legislative history to support the position above summarized and the court passed to the examination of that history. After a detailed examination of the various drafts of the bill its amendments and the committee reports of both Houses and the conference report, it was declared by the Court:

> We see nothing in this legislative history to affect our conclusion which is drawn from the meaning of the entire act.

The Court accordingly passed to the examination of the language of the statute and dealing with certain phases of that subject MR. JUSTICE REED said:

> Apparently the draftsmen of the act first set out the places to be protected, and included in that connotation ships and planes and then in 1(b) covered much of the contents of such places in the nature of plans and documents. Section 2(a), it will be observed, covers in much the same way the delivery of these movable articles or information to a foreign nation or its agent. If a government model of a new weapon were obtained or delivered there seems to be little logic in making its transfer a crime only when it is connected in some undefined way with the places catalogued under 1(a). It is our view that it is a crime to obtain or deliver, in violation of the intent and purposes specified, the things described in sections 1(b) and 2(a) without regard to their connection with the places and things of 1(a).

Reviewing the cases relied upon by the defendants in which it had been held that the language of a criminal act should be so definite as to its meaning that it was not susceptible of a double meaning and did not force one at his peril to speculate as to whether certain actions violated the statute, the Court said:

> But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established.

It had been contended that the words "national defense" were not words of definite meaning and to this the opinion declared:

> National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning. Whether a document or report is covered by sections 1(b) or 2(a) depends upon their relation to the national defense, as so defined, not upon their connection with places specified in section 1(a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.

At the conclusion of all the evidence, defendants moved for a verdict of acquittal because the innocuous character of the evidence forbade conclusion of bad intent or injury to the United States or advantage to a foreign nation and because the evidence failed to disclose that the reports obtained and communicated to the foreign agent anything which related to or was connected with the national defense and because the trial court in his charge to the jury stated that "the jury has no privilege in determining whether or no any of these reports has to do with the national defense, that is a matter for the court and not for the jury as a matter of law." The reports were shown by the evidence to be "a detailed picture of the country—espionage work of the naval intelligence drawn from its own files," dealing with activities of the military forces. It was observed that a foreign government in possession of this information would be in a position to use it in following the movements of the agents reported on or as a check upon this country's efficiency in ferreting out foreign espionage and that the reports were a part of the nation's plan for armed defense.

As to the contention that it must be shown by the evidence that the information contained in the reports was to be used to the injury of the United States, the explicit provision of the statute was pointed to phrasing the crime of espionage "as an act of obtaining information relating to the national defense . . . to be used to the advantage of any foreign nation." No distinction was made between friend and enemy and the court observed "unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing this guarded information either to our hurt or another's gain."

Objection had been raised also to other parts of the charge of the court to the jury. It was held that by its charge the trial court undertook to give to the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense, that the instructions set out the definition of the national defense in a manner favorable and

unobjectionable to defendants and the opinion concluded with the following statement:

Viewing the instructions as a whole, we find no objection sufficient to justify reversal.

The judgment of the Circuit Court of Appeals affirming the District Court was affirmed.

MR. JUSTICE MURPHY took no part in the consideration or decision of the case.

Donald R. Richberg argued the case for the defendants (S. W. Richardson, Isaac Pacht, Clore Warne, Harry G. Balter and Willard J. Stone with him on the brief); Warner W. Gardner argued the case for the United States (Francis Biddle, Solicitor General, John Rogge, Assistant Attorney General, Louis B. Schwartz, Edwin E. Huddleson, Jr., and Anderson Page with him on the brief.)

Aliens—Registration

The passage of the federal Alien Registration Act is an exercise by the Congress of the paramount authority of the nation over that subject. It preempts that field. The Alien Registration Act of the State of Pennsylvania, is an invasion of federal authority and is invalid.

Hines, Sec'y of Labor, etc. v. Davidowitz, 85, Adv. Op. ——; 61 Sup. Ct. Rep. ——, U. S. Law Week 4135. (No. 22, decided January 20, 1941).

In 1939 Pennsylvania adopted an Alien Registration Act requiring every alien eighteen years or over with certain exceptions to register once each year, to provide certain information required by the statute and by the Department of Labor, to pay a registration fee, to receive and carry at all times an alien identification card, and to comply with other requirements. Non-exempt aliens who fail to register are subject to fine and imprisonment. Two aliens brought suit before a three-judge district court against the Pennsylvania Secretary of Labor to enjoin the enforcement of the act. The three-judge court enjoined enforcement but in 1940, after the Pennsylvania act had been held invalid, Congress enacted an alien registration act. The basic subject of the State and Federal laws is identical. The aliens appealed and the judgment was affirmed.

The opinion of the court was delivered by MR. JUSTICE BLACK.

The appeal was taken from a judgment rendered before the Federal Act took effect and appellants sought to confine the question to the validity of the State statute, but the court held that that act must be viewed in the light of the Congressional act and that the real question was, whether the Federal power in this field, exercised or unexercised, is exclusive.

Passing therefore to the question of the supremacy of the national power in the field of foreign affairs, including power over immigration, naturalization and deportation, and the effect of treaties concerning the status of alien subject, MR. JUSTICE BLACK said:

> The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

Emphasizing the importance of international relationship in this field MR. JUSTICE BLACK said:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. . . .
>
> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one. Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs.

MR. JUSTICE BLACK gave particular regard to the importance of uniformity in the treatment of aliens and said:

> And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

The conclusion of the Court on this question of the supremacy and exclusive character of the national legislation was stated as follows:

> Our conclusion is that appellee is correct in his contention that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.

The second point discussed in the opinion involved inquiry whether or not Congress has so acted as to preclude enforcement of Pennsylvania's law. The history of legislation and treaties from the colonial history to the time of the legislation under consideration was examined and in conclusion MR. JUSTICE BLACK said:

> We have already adverted to the conditions which make the treatment of aliens, in whatever state they may be located, a matter of national moment. And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable. The legislative history of the Act indicates that Congress was trying to steer a middle path, realizing that any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart, but also feeling that the Nation was in need of the type of information to be secured. Having the constitutional authority so to do, it has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced.

MR. JUSTICE STONE filed a dissenting opinion. The

opening paragraph of his opinion indicates the measure of his dissent.

> Undoubtedly Congress, in the exercise of its power to legislate in aid of powers granted by the Constitution to the national government may greatly enlarge the exercise of federal authority and to an extent which need not now be defined, it may, if such is its will, thus subtract from the powers which might otherwise be exercised by the states. Assuming, as the Court holds, that Congress could constitutionally set up an exclusive registration system for aliens, I think it has not done so and that it is not the province of the courts to do that which Congress has failed to do.

Calling attention to the fact that the opinion of the court does not deny that the Pennsylvania registration statute, when passed, was a lawful exercise of the Constitutional power of the State, he said:

> The national government has exclusive control over the admission of aliens into the United States but, but after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state and, in the exercise of that power, state legislatures may pass laws applicable exclusively to aliens so long as the distinction taken between aliens and citizens is not shown to be without rational basis. . . . The federal government has no general police power over aliens and, so far as it can exercise any control over them, it must be in the pursuance of a power granted to it by the Constitution.

MR. JUSTICE STONE also pointed out that the Federal act did not at any point conflict with the State statute nor by its terms purport to control or restrict State authority, but that the Government contended that Congress by passing the Federal act had occupied the field. He denied the validity of a test by such expressions as "occupying the field" and stated his view of the rule as follows:

> Federal statutes passed in aid of a granted power obviously supersede state statutes with which they conflict. But we are pointed to no such conflict here. In the exercise of such powers Congress also has wide scope for prohibiting state regulation of matters which Congress may, but has not undertaken to regulate itself. But no words of the statute or of any committee report, or any Congressional debate indicate that Congress intended to withdraw from the state any part of their constitutional power over aliens within their borders.

He supported that interpretation of the rule by reference to the effect of the exercise of the treaty making power and pointed out that no treaty has a nullifying power over State statutes unless it conflicts with them. His dissenting opinion was closed with the following paragraph:

> Here compliance with the state law does not preclude or even interfere with compliance with the act of Congress. The enforcement of both acts involves no more inconsistency, no more inconvenience to the individual, and no more embarrassment to either governmet than do any of the laws, state and national, such as revenue laws, licensing laws, or police regulations, where interstate commerce is involved, which are equally applied to the citizen because he is subject, as are aliens, to a dual sovereignty.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS concur in the dissenting opinion.

M. Louise Rutherford and William S. Rial, Deputy Attorneys General, argued the case for the Pennsylvania authorities. (Claude T. Reno, Attorney General of Pennsylvania with them on the brief.) Isadore Ostroff argued the case for the aliens. (Herman Steerman and Messrs. Needle, Needle & Needle with him on the brief). Francis Biddle, Solicitor General, argued the case for the United States as *amicus curiae*. (Francis M. Shea, Assistant Attorney General Melvin H. Siegel, Richard H. DeMuth and Oscar H. Davis with him on the brief.)

Bankruptcy—Section 77—Damages for Rejection of a Long-Term Lease

Upon the rejection of a 999-year lease, by Trustees under Section 77 of the Bankruptcy Act, the lessor is entitled to a claim for the actual damage sustained by reason of the rejection of the lease. The actual damage is measured by the present value of the rent reserved less the present rental value of the remainder of the term.

Earnings, proved for a 14-year past period are an admissible basis for estimating probable future earnings for 8 years, and an award of damage predicated on future earnings, so determined, will be sustained as the present rental value of the remainder of the term.

Palmer v. Connecticut Ry. & Lighting Co., 85 Adv. Op. 283; 61 Sup. Ct. Rep. 379; U. S. Law Week, 4108. (No. 38, decided January 6, 1941).

The opinions in this case deal with questions as to the proof of damages upon the rejection of a long term lease, by Trustees in bankruptcy under Section 77 (b) of the Bankruptcy Act.

The Trustees of the New York, New Haven and Hartford rejected a 999-year lease of certain properties of the Connecticut Railway and Lighting Company, respondent. The annual rent reserved under the lease was about $1,050,000. At the time of its rejection the lease had 969 years to run.

The statute allows a claim to the lessor "to the extent of the actual damage or injury in accordance with principles obtaining in equity proceedings." Under a previous ruling by the Supreme Court, 305 U. S. 493, the measure of damages was laid down as "the present value of the rent reserved less the present rental value of the remainder of the term."

To prove the rental value the respondent offered evidence of annual earnings for 40 years. Future earnings for the period 1939-1975 were estimated by alternative calculations of average annual earnings, before federal taxes, over 4 prior base periods each ending December 31, 1938: (1) the preceding 1½ years of 100% bus operation; (2) three years of actual operation, after rejection, covering a transition from trolley to bus operation; (3) ten years, 1929-1938, as to which partial reconstruction of the accounts was necessary; and (4) fourteen years, 1925-1938. To get rental value the earning power of money in the sinking fund and annual payments to it were added to operating profit calculated from the four base periods. Since the earnings were erratic, varying from $78,000 to $775,000 in the 14 year period, the annual rental value for the future varied according to the base used. Damages calculated for 40 years showed a range from 9½ millions to 13⅓ millions.

The district court refused to find future earnings by projecting the average earnings for any of the four base periods. It concluded that even if there were acceptable proof of the annual rental value for 40 years or any period materially shorter than the remainder of the term, it would be inconclusive as to present rental value of the remainder, since profits or losses of years not included would upset the calculations for the earlier years.

The circuit court of appeals concluded that "in effect the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast." It thought

that the evidence of earnings over experience of 14 years was adequate to ground a reasoned conclusion as to probable earnings for 11 years, including 3 years as to which the earnings were known. It allowed damages at $4,411,837.61.

On certiorari, the Supreme Court affirmed the ruling of the circuit court, by a divided bench. MR. JUSTICE REED delivered the prevailing opinion. The opinion alludes to the fact that business and government alike are accustomed to fix the rental value of property for long-term leases and the value of the lease over and above the rent reserved at varying periods of the term.

In support of the view that the evidence of rental value for a portion of the remainder of the term is probative of the value for the whole remainder of the term, MR. JUSTICE REED states:

> However nebulous the concept of a long lease may be, it is not a fiction but an actual instrument. Nothing appears in the record to suggest that the rental agreed upon was other than a reasonable return upon the value of the demised property, fairly negotiated. At the time the lease was executed, it is fair to assume the parties thought the annual rent reserved and rental value were the same. Without proof to the contrary only nominal damages would be allowed the claimant. And, until something else is shown, courts are entirely justified in assuming that for the long years ahead the rent and the rental value are the same. As a consequence, evidence of rental value smaller in amount than the rent reserved for a term shorter than the remainder of the lease is, in the absence of testimony as to other years, proof of the damages for the years covered. Since the presumption is that the rent and rental value for the remainder of the term are the same, the damage proven is to be considered as all the damage for the rejection of the lease.

The second question considered was whether the evidence justified any award, whether the quantum of proof formed an adequate basis for a reasoned judgment. In dealing with this phase of the case, the opinion recognizes that future rental cannot be susceptible of precise proof. But, on analysis, the evidence here is found to be adequate to sustain the award. In this connection the opinion stresses the fact that past earnings give a reasonable basis for determining future profits, which largely control present rental value. As to this MR. JUSTICE REED says:

> The proof of future profits by the evidence of past profits in an established business gives a reasonable basis for a conclusion. It is true that this business changed from trolley to bus within two years of the end of the base period and that management changed from lessee to lessor but we think the fact of transportation in the same communities for more than a quarter of a century sufficed to give the operation the classification of an established business. Here different methods of operation or normal changes in the executive staffs do not seem sufficient to interfere with the probative value of past experience. Franchises and property of street railways and bus lines are difficult of appraisal. Nothing is more indicative of their value for lease or sale of the fee than past earnings. If we were to adopt the view that the interest conveyed is a defeasible fee, its defeasance dependent upon a condition such as nonpayment of annual instalments of the purchase price, the same difficulties exist. The unknown subtrahend would be the present value, instead of the rental value. Evidence of value would be made up of the items of proof. One of the most important of these, in the case of property such as here involved, would be past earnings. . . .
>
> Satisfactory evidence was presented for the three years of actual operation of the properties covered by this lease. We think that prior earnings of the same property over fourteen years was a fair base to use to project the estimate of the earnings for the eight years of future operation. The failure to produce further evidence, either through experts or transportation surveys, was not fatal to respondent's case, even though such evidence is admissible. We see no reason to disagree with the conclusion of the circuit court of appeals that under the evidence presented the damages for eight years might be predicted with a "fair degree of certainty."

MR. JUSTICE DOUGLAS delivered a dissent, in which MR. JUSTICE BLACK concurred, in which the view is urged that the proof was inadequate to support any award without violating the rule against the allowance of speculative damages.

MR. JUSTICE FRANKFURTER also delivered a brief dissent.

The case was argued by Mr. James Garfield for the petitioners, and by Mr. George W. Martin for the respondent.

Income Taxes—Deduction of Losses on Foreclosure Sale of Capital Asset

The sale of a capital asset at a foreclosure sale, after default under the purchase contract, constitutes a sale within the meaning of Section 23 (e) (2) (j) of the Revenue Act of 1934, so that the deduction of the loss on account of the sale is limited under the capital loss provisions of Section 117 (b).

Helvering v. Hammel, 85 Adv. Op. 295; 61 Sup. Ct. Rep. 368, U. S. Law Week, 4115 (No. 49, decided January 6, 1941).

This case involves the question whether a loss sustained by an individual taxpayer on foreclosure sale of his interest in realty, acquired for profit, is a loss deductible in full from gross income under Section 23 (e) (2) of the 1934 Revenue Act, or is a capital loss deductible only to the limited extent provided in Sections 23 (e) (2) (j), and 117.

Section 23 (e) (2) permits the deduction of losses sustained during the year incurred in any transaction for profit, in the computation of taxable income. Subsection (j) provides that "losses from sales or exchanges of capital assets" shall be allowed only to the extent of $2,000 plus gains from such sales or exchanges as provided in Section 117 (d). "Capital assets," under Section 117 (b) means "property held by the taxpayer . . . but does not include stock in trade of the taxpayer . . . or property held . . . primarily for sale to customers in the ordinary course of his trade or business."

In the instant case, the taxpayers with others in a syndicate had bought land on a "land contract." The buyer defaulted, and on foreclosure a sale was ordered. The respondents' contribution to the purchase money, some $4,000, was lost.

In computing the respondents' taxable income for 1934, the commissioner treated the taxpayers' interest in the land as a capital asset, and allowed deduction of the loss from gross income only to the extent of $2,000 as provided in Section 23 (j) and 117 (d), in the case of losses from sales of capital assets. The Board of Tax Appeals ruled that the loss was deductible in full, and the circuit court of appeals affirmed, holding that loss established on a foreclosure sale was not a loss from a "sale" within the meaning of Section 23 (j).

On certiorari this ruling was reversed by the Supreme Court, in an opinion by MR. JUSTICE STONE. The opinion cites the respondents' argument that a distinction is to be drawn between a voluntary sale of a capital asset and an involuntary sale through foreclosure of a lien on the capital asset. This distinction is rejected by the Court's opinion, as without foundation

in the language, or in the history or purpose of the statutory provisions applicable.

The following portion of the opinion sets forth the Court's view on this question:

> Congress thus has given clear indication of a purpose to off-set capital assets by losses from the sale of like property and upon the same percentage basis as that on which the gains are taxed. . . This purpose to treat gains and deductible losses on a parity but with a further specific provision provided by Section 117 (d) of the 1934 Act, permitting specified percentages of capital losses to be deducted from ordinary income to the extent of $2,000, would be defeated in a most substantial way if only a percentage of the gains were taxed but losses on sales of like property could be deducted in full from gross income. This treatment of losses from sales of capital assets in the 1924 and later Acts and the reason given for adopting it afford convincing evidence that the "sales" referred to in the statute include forced sales such as have sufficed, under long accepted income tax practice, to establish a deductible loss in the case of non-capital assets. Such sales can equally be taken to establish the loss in the case of capital assets without infringing the declared policy of the statute to treat capital gains and losses on a parity. We can find no basis in the language of the Act, its purpose or its legislative history, for saying that losses from sales of capital assets under the 1934 Act, more than its predecessors, were to be treated any differently whether they resulted from forced sales or voluntary sales. True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results,... or would thwart the obvious purpose of the statute... But courts are not free to reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure.

No. 62, *Electro-Chemical Engraving Co. Inc. v. Commissioner,* 85 Adv. Op. ——; 61 Sup. Ct. Rep. 372, U. S. Law Week, 4117 (decided January 6, 1941) disposes of a similar question in respect of a corporate taxpayer. The ruling of the circuit court, limiting the deductible capital loss in accordance with Section 117 (2) is affirmed for the reasons stated in the *Hammel case* opinion.

MR. JUSTICE ROBERTS dissented in both cases.

The case was argued by Mr. Norman D. Keller for the Government and by Mr. John J. Sloan in No. 49, and by Mr. George P. Halperin for the petitioner and by Mr. Keller for the Government in No. 62.

Summaries

Bankruptcy—Appeals from Orders Making or Refusing Allowances of Compensation.

Reconstruction Finance Corporation v. Prudence Securities Advisory Group, 85 Adv. Op. 300; 61 Sup. Ct. Rep. 331; U. S. Law Week, 410 (decided January 6, 1941).

Certiorari to consider the proper procedure in taking an appeal from an order making or refusing allowances of compensation or reimbursement under Chapter X of the Chandler Act. *Dickinson Industrial Site, Inc. v. Cowan,* 309 U.S. 382, ruled that all orders of that character are appealable only in the discretion of the circuit court of appeals. Prior thereto it had been held in the second circuit that appeals from such orders, involving $500 or more could be had as a matter of right. *London v. O'Dougherty,* 102 F. (2d) 524. In the interim the petitioners endeavored to take appeals from compensation orders under former Section 77B by filing notices of appeal, within the period provided by Section 25 (a), in the district court. But after the decision in the *Dickinson Case* the circuit court dismissed the appeals.

On certiorari the Supreme Court, in an opinion by MR. JUSTICE DOUGLAS held that, while the proper procedure here for appealing was to file an appeal in the circuit court, and although the procedure adopted by the petitioners was irregular, it was not a fatal jurisdictional defect, and that the circuit court had power to allow the appeals. The orders below were reversed.

MR. JUSTICE REED delivered a brief concurring opinion, in which MR. JUSTICE ROBERTS joined.

The case was argued by Assistant Solicitor General Charles Fahy for the petitioners, and by Mr. John Gerdes for the respondents.

Income Taxes—Losses on Retirement of Securities —Not Deductible as Bad Debts—Classed as Capital Losses.

McClain v. Commissioner of Internal Revenue, 85 Adv. Op. 293; 61 Sup. Ct. Rep. 373, U. S. Law Week, 4115; No. 55; *Helvering v. Thomson,* — Adv. Op. —; 61 Sup. Ct. Rep. 373, (No. 58, decided January 6, 1941).

Certiorari to determine whether upon the surrender of bonds or debentures in exchange for a money payment less than cost, a taxpayer may deduct the loss from his gross income as a bad debt under Section 23(k) or must treat it as a capital loss under Section 117(f) of the Revenue Act of 1934.

In both cases (Nos. 55 and 58) the taxpayers owned securities, the issuers of which became financially embarrassed. The taxpayers accepted cash payments substantially less than the face amount of the debts evidenced by the securities, and in their income tax returns charged off the losses and claimed deduction therefor.

In No. 55 the Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals disallowed the deduction.

In No. 58 the Commissioner and the Board disallowed the deduction, but the Circuit Court of Appeals reversed.

On certiorari the views of the Commissioner and the Board were sustained by the Supreme Court, and the judgment in No. 55 affirmed and that in No. 58 reversed. Mr. Justice Roberts delivered the opinion of the court.

Section 117(f) provides that for purposes of the title dealing with capital gains and losses, "amounts received by the holder upon the retirement" of certain securities, including those involved here, "shall be considered as amounts received in exchange therefor."

The opinion construes this provision as transferring transactions of the character here involved from the category of bad debt transactions to that of capital gains and losses.

The case was argued by Mr. Edward D. Smith, Jr. for the petitioner and by Helen R. Carloss for the respondent in No. 55, and by Helen R. Carloss for the petitioner and by Mr. T. F. Davies Haines for the respondent in No. 58.

Treaties—Conclusiveness of Awards of German-American Claims Commission—Judicial Power Over Foreign Relations

Z & F Assets Realization Corp. v. Cordell Hull, 85 Adv. Op.. 336, 61 Sup. Ct. Rep. 351, U. S. Law

Week 4120. [Nos. 381, 382, decided January 6, 1941.]

Certiorari to review a decision of the District Court of the District of Columbia which dismissed an action by holders of awards of the Mixed Claims Commission, United States and Germany, seeking to invalidate later awards of the Commission which had been certified for payment by the Secretary of State in favor of the Lehigh Valley Railroad Company, and others, on account of damages arising out of German sabotage which caused explosions at Black Tom and Kingsland, New Jersey, in 1916-1917. The action had been dismissed on the ground that the question of validity of the awards is political in its nature and the court was without jurisdiction to entertain it.

The Court's opinion by MR. CHIEF JUSTICE HUGHES, holds that the prior awardees have standing under the Settlement of War Claims Act of 1938, to sue to protect their interests under the Act, but they may not avoid the conditions of the Act, or successfully challenge payments for which the Act provides. It then finds that in enacting the provision which required the Secretary of the Treasury to pay out of a special account all awards of the Commission certified to him by the Secretary of State, Congress intended to impose upon the Secretary of State duties which were not merely ministerial, but which required the exercise of his deliberation and judgment in relation to the conduct of foreign affairs; that, therefore, the certificate of the Secretary certifying payment is conclusive under the terms of the statute and other award holders have no right to complain at payment of later awards which he has certified.

MR. JUSTICE ROBERTS did not participate.

MR. JUSTICE BLACK concurred in a separate opinion in which he was joined by MR. JUSTICE DOUGLAS. The concurring opinion concludes that the prior award holders set up no justifiable controversy which the Court could determine since the questions raised involved relations between the United States and Germany which are Constitutionally committed exclusively to the legislative and executive departments.

The case was argued on December 9th and 10th, 1940, by Mr. Joseph M. Proskauer for petitioner Z & F Assets Realization Corp., by Mr. Fred K. Nielsen for petitioner American-Hawaiian Steamship Company, by Mr. Solicitor General Biddle for respondents, Cordell Hull and Henry Morgenthau; and by Mr. William D. Mitchell for respondent Lehigh Valley Railroad Company.

Due Process of Law—Validity of State Oil Proration Order—Power of Federal Courts to Review State Administrative Action

Railroad Commission of Texas v. Rowan & Nichols Oil Co. 85 Adv. Op. 321, 61 Sup. Ct. Rep. 343, U. S. Law Week 4106, 4108. [No. 218, decided January 6, 1941.]

Certiorari to review a decree of the Federal District Court in Texas which enjoined the enforcement of an order of the Texas Railroad Commission formulating a plan of proration among oil well owners of the total amount of oil then allowed to be produced in the East Texas field. The Commission's order involved a modification of its previous order held valid in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (summarized in 26 A. B. A. J. 587 (July, 1940). The modification took into account two new factors, bottomhole pressure and the quality of surrounding sand, as well as hourly potential in the formula used to determine the allowable production for wells which could not produce 20 barrels a day.

The Court's opinion by MR. JUSTICE FRANKFURTER first points out that the order satisfied all procedural requirements. It finds that the previous order and the present one are indistinguishable on constitutional lines. It discusses in detail the complications of oil production regulation and concludes that the Constitution does not warrant judicial rejection of the conclusions of the Commission. The injunction decree of the District Court was, therefore, vacated.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE ROBERTS, noted their dissent for the reasons given in their dissenting opinion in *Railroad Commission of Texas v. Rowen & Nichols, supra.*

The case was argued on December 12th and 13th, 1940, by Mr. James P. Hart to appellants and by Mr. Dan Moody for appellee.

Suits Against the United States—Validity of Judgment When Jurisdiction Is Attacked—Suits Under Trading with the Enemy Act

United States v. Irving Trust Company, 85 Adv. Op. —, 61 Sup. Ct. Rep. —, U. S. Law Week 4124. [No. 75, decided January 6, 1941.]

Certiorari presenting the question whether an unappealed decree of the District Court against the Alien Property Custodian entered in 1929, in a suit under § 9 (a) of the Trading with the Enemy Act which permits anyone not an enemy or ally of enemy claiming an interest or right in alien property seized, or to whom a debt may be owing by the alien enemy, to sue the Alien Property Custodian, to establish his right and secure payment out of the seized property, may be set aside in collateral proceedings on the ground that the court was without jurisdiction because the beneficial owner of the claim sued on was an "enemy" as defined by the Act, and the suit was, therefore, one against the United States to which it had not given its consent.

The Court's opinion by MR. CHIEF JUSTICE HUGHES holds that the district court upon trial of the original action was obliged to resolve the disputed question of fact as to the status as an "enemy" of the claimant, and its decision that the jurisdictional facts were established cannot be attacked collaterally, but could have been reviewed only by appeal.

MR. JUSTICE MURPHY did not participate.

The case was argued on December 19, 1940, by Mr. Assistant Attorney General Shea for petitioner and by Mr. Nathan L. Miller for respondents.

Due Process—State Statues—Notice to Corporation as Notice to Shareholders

Voeller v. Neilston Warehouse Co., 85 Adv. Op. 314, 61 Sup. Ct. Rep. 376, U. S. Law Week 4113. [No. 97, decided January 6. 1941].

The Ohio Supreme Court held that the Ohio statute providing that the value placed upon his stock by a dissenting shareholder should, after six months, and under certain circumstances, be conclusively deemed to be equal to the fair cash value, operates unconstitutionally against the majority shareholders because it violates the due process clause of the 14th Amendment. The statute required that the demands of the dissenters be made known only to the corporation, and it was urged that the majority shareholders were thus deprived of property without notice and opportunity

for hearing. Certiorari was allowed and the judgment of the Ohio Court affirmed.

The Court's opinion by MR. JUSTICE BLACK finds that the statute does not violate the Federal Constitution. Held that notice to the corporation of the demand for payment constituted notice to the majority stockholders and is a compliance with Constitutional due process.

The case was argued on December 18, 1940, by Mr. Francis J. Wright for respondents and submitted by Mr. Carrington T. Marshall and Mr. Orland R. Drawfis for petitioners.

Government Contracts—Processing Taxes

United States v. Cowden Mfg. Co., 85 Adv. Op. ——, —— Sup. Ct. Rep. ——, U. S. Law Week 4127 (No. 188, decided January 13, 1941).

Respondent (hereinafter called "manufacturer") contracted with the United States to furnish certain mechanics' suits at a stated price, plus processing and other taxes imposed or charged by Congress after the date of the opening of bids, applicable directly upon the "production, manufacture or sale of the supplies covered by this contract." The contractor arranged with sub-contractors for the purchase of cotton cloth, thread, and labels to be used in manufacturing the suits. After the opening of bids, processing taxes were imposed on the sub-contractors for the cotton thread and labels which they paid, and for which the contractor, pursuant to the terms of his agreement with the sub-contractor, reimbursed them and so charged the government with the amount of the taxes so refunded. The Comptroller General rejected the claim. The contractor brought suit in the Court of Claims and obtained judgment. Certiorari was granted because of the importance of the question and the judgment of the Court of Claims was reversed.

It was held in an opinion delivered by MR. JUSTICE MURPHY, that under the contract the United States had not agreed to pay the contractor the amount which he paid to his sub-contractors to reimburse them for taxes paid by them for the processing of the goods sold by them to the contractor, but only those imposed on contractor and paid by him pursuant to an obligation directly imposed upon him by a statute which exacts the tax.

The case was argued by Andrew D. Sharpe (Francis Biddle, Solicitor General, Samuel O. Clark, Jr., Assistant Attorney General, J. Louis Monarch, and Hubert Will with him on the brief) for petitioner; Phil D. Morelock (Morelock & Lamb with him on the brief) for respondent.

State Statutes—Nebraska Full Train Crew Law

Henry J. Beal, County Attorney v. Missouri Pacific Railroad Corporation, —— Adv. Ops. ——, ——Sup. Ct. Rep. ——, U. S. Law Week 4140. (No. 72, decided January 20, 1941).

A statute of Nebraska makes it unlawful for any railroad in that state to operate passenger or freight trains without train crews of specified numbers. The railroad invoked the jurisdiction of the district court on grounds of diversity of citizenship and sought to restrain the enforcement of the act. The district court granted injunction, and the court of appeals affirmed. The Supreme Court took the case on certiorari and reversed the lower courts with instructions to the district court to dismiss the bill of complaint.

MR. JUSTICE STONE delivered the opinion of the court. The basis of the decision was that courts of equity do not ordinarily restrain criminal prosecutions especially where the only threatened action is the prosecution in State courts by State officers for an alleged violation of State law. It was held that interference with the process of the criminal law in State cases is justified only in most exceptional circumstances and where there is clear proof that injunctive relief is necessary to prevent irreparable injury. It was held that there was no sufficient proof of irreparable injury and no proof of danger of multiplicity of prosecutions.

The case was remanded with instructions to dismiss, but the CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE STONE were of opinion that the case should be remanded to the district court for further proceedings.

J. Emerson Kokjer and J. Edwin Vail, Assistant Attorneys General of Nebraska, argued the case for the State and County authorities. (Walter J. Johnson, Attorney General of Nebraska with them on the brief.)

George L. DeLaney argued the case for the Railroad. (J. A. C. Kennedy, R. Svoboda, Y. C. Hollen and E. J. Svoboda with him on the brief).

Federal Securities Act—Sale of Treasury Stock Not Registered For Sale Under That Act

A. C. Frost & Company v. Cocur D'Alene Mines Corporation, ——Adv. Op. ——, —— Sup. Ct. Reps. ——, U. S. Law Week 4142 (No. 78, decided January 20, 1941).

Respondent corporation (hereinafter called "Mining Company") contracted to one Boland, sole and exclusive right to purchase the whole or any part of its treasury stock for resale. Boland immediately assigned the contract to petitioner Frost & Company (hereinafter called "broker"). 165,000 shares were sold and paid for. None of those shares were registered under the Securities Act of 1933. The Mining Company refused delivery of the remaining optioned stock on the ground that none of the shares were so registered. The broker brought suit in an Idaho State court for damages for the breach of the contract. The answer denied liability on the ground that the contract was entered into in violation of law and particularly in violation of the Security Act of 1933.

The trial court held the option unenforceable so far as not executed because contrary to law, that petitioner could recover only on the executed sales but not for failure to deliver.

The Supreme Court of Idaho ruled that the contract was void from the beginning. It ordered final judgment for the mining company.

The Supreme Court took the case on certiorari since the action was based solely upon the interpretation and application of the Securities Act and a federal question was thus presented. The judgment of the Supreme Court of Idaho was reversed.

Held, in an opinion by MR. JUSTICE MCREYNOLDS, that the purpose of the act is to protect investors by requiring publication of certain information respecting securities before offer for sale. That since the act gave definite remedies for the failure to register and did not declare the sale of unregistered shares absolutely void, and since such a holding was deemed to be injurious to the public interest, the courts should not add to the prescribed sanctions another and different penalty which might be followed by injurious results.

MR. JUSTICE STONE concurred in the result.

MR. JUSTICE DOUGLAS took no part.

Robert L. Wilkinson and John W. Cragun argued the case for the Broker; William H. Langroise and James A. Wayne for the Mining Company; Francis Biddle, Solicitor General, Edwin M. Huddleson, Jr., Chester F. Lane, Assistant General Counsel, and Christopher M. Jenks, Assistant General Counsel filed brief on behalf of SEC.

BETTER OPINIONS — HOW?

By Hon. Robert G. Simmons
Chief Justice, Supreme Court of Nebraska

In his letter of transmission the author of this article says:

"In preparing to write the paper 'Better Opinions—How?' I wrote to every presiding judge of all the appellate courts—state and federal—to the deans of most of the law schools and to others in the profession. I submitted to them the question, 'How can the bar assist the appellate courts in improving the form and substance of opinions?' I asked their constructive criticism of the work of the appellate courts and called particular attention to Mr. Beardsley's address in Chicago a year ago suggesting that the bar submit proposed opinions with their briefs. The paper is based upon the replies received, together with my own limited experience as an appellate judge."

A RECENT survey made by a committee of the American Bar Association shows that a great majority of lawyers prefer: One—Short written opinions; Two — Memorandum opinions in cases in which the law is already clear; Three—The omission of "pure dicta."[1]

In legal publications, and wherever lawyers gather, the charge is made that opinions are too long; that they are lacking in clarity and conciseness; that they result in an overabundance of and confused statements of the law and in excessive burdens upon the work of the research lawyer; and that they cause difficult, if not unbearable, expense to the lawyer who makes an effort to buy the published decisions of the courts of the country. The charge is generally made that the fault lies with the appellate court judges.

These objections go to opinions in cases in which the lawyer has not been a party. To the lawyer who represents the successful litigant, almost any opinion is acceptable if he approves the conclusion. An analysis of motions for rehearing indicates that most lawyers do not favor short opinions in cases in which they represent the losing party. To the unsuccessful litigant, the opinion seldom, if ever, is correct. It is subject to adverse, if not profane, criticism if it does not specifically answer all propositions advanced by the losing party, and if it does not particularly discuss all cases cited in support of those propositions. It is to the credit of our profession that the lawyer, for the losing litigant, is not satisfied. He should believe in the justice of his cause and the legal propositions which he advances.

It is my purpose in presenting this paper to provoke discussion between the bench and the bar on this general subject. It is a subject that should be discussed. It is not my purpose to defend either the shortcomings or the long opinions of appellate courts. Judges, like other mortals, are human. Judges and courts make mistakes. Their work is not perfection either in form or substance. I know of no judge who would not admit frankly that some of his opinions are too long, and by no means perfect. Nor do I know of any judge who is not ready and anxious to improve the quality of his work.

Let us assume the merit of the charge. What is to be done about it? Before a remedy can be prescribed, it is necessary to determine the cause of the trouble. On the surface, it might appear that the fault lies entirely with the appellate judges—for do they not write the opinions against which complaint is made?

Let us analyze the problem. What are the purposes of an opinion? First, the proposed opinion represents the work of one judge who has given intensive study to the record, the briefs, and the law, and is the decision which he recommends to his associates for adoption. It contains his reasons for that recommendation. Second, it advises the trial court and the litigants of the decision and the reasons therefor. Third, if the decision results in a reversal and a retrial, it—so far as the issues presented require—directs the trial court as to what shall be done in the subsequent proceedings. Finally, for bench, bar, and layman, the opinion serves as an authoritative guide to the rules of law to be followed in the future.

What must be the content of an opinion? It must state: First—the facts either of pleading or evidence, or both; second, the issues presented for decision, and, in some but not all cases, how those issues arise; third, the applicable law, and where not already definitely declared, the statement of sound fundamental principles and the necessary reasoning leading from those principles to the conclusion embodied in the judgment of the court; and, fourth, the decision reached. The opinion should contain facts, issues, law, reasons, and decision with sufficient detail, exactness, and clarity to enable the profession to determine, *from the opinion*, without too much effort, just what has been decided and why.

From the above analysis of the purpose and content of an opinion, it is obvious that we cannot streamline opinions to the plan of the report of a train wreck, "Off again, on again, gone again Finnigan," without doing violence to the service that the written opinion renders. It is also obvious that mere brevity is not the ultimate end to be achieved.

The memorandum opinion is, of course, in its final analysis, a short opinion. It disposes of the litigation, but serves no other useful purpose. A short opinion, in many cases, will no more adequately serve the purpose which an opinion accomplishes than would a passenger bus serve to carry the volume of traffic now handled by the streamlined, air-conditioned trains. Just as the traffic to be carried on the train depends upon the shipper, not the crew, so, to a certain extent, an opinion's length is controlled not by the writer, but by the issues presented and the difficulties of their solution. The more questions presented, the longer the opinion, is an inescapable conclusion.

Wherein can judges improve opinions?

Opinions often contain useless recitals of the pleadings, detailed recitals of immaterial facts, and often unnecessary recitals of evidence which the trial jury has disbelieved. They often likewise contain lengthy quotations from opinions, textbooks and statutes. It is sometimes necessary to state pleadings in order that issues may be clearly presented. Where a factual situa-

1. See Report of Committee on Legal Publications and Law Reporting at Philadelphia, Sept. 1940; Annual Report A. B. A., 1940. See also summary of such Report, December 1940 issue of A. B. A. Journal, p. 943.

tion is presented for decision, a detailed recital is necessary for clarity.

Short quotes from opinions are readily justified. They are not often used unless clear and concise. To use them as made, particularly where stating an established rule, rather than to attempt to paraphrase the rule is to avoid the possible inference of a change in the rule. The quotes likewise call attention to the specific part of an opinion relied upon as an authority.

It may be conceded that lengthy quotations from the reports of the court's own decisions are seldom justified. However, it is recognized that in many of our western states, if not in all states, there are many lawyers who do not possess or have access to the reports of other states. To them, quotes are of value in the study of opinions. Mere citations of decisions of other jurisdictions are, as a practical proposition, often useless. Should quotes be excluded for the sake of brevity and those lawyers who have access to all the reports, or be included for the benefit that they will be to all members of the bar?

Where a statute is being construed, should it be quoted or merely cited? The exact language of the statute is essential to an understanding of the opinion. Obviously, within the jurisdiction of the court, *when* the opinion is released, the statute will be available to the bar for reference, and for them a citation is sufficient. However, opinions construing statutes are often of importance years after they are written when statutes have been amended, and (except in the larger libraries) are often no longer available. The quotation of a statute now will save much research for courts and lawyers in the years to come. Few members of the bar of other jurisdictions have access to foreign statutes. For them the opinion may be valueless from its rendition, unless the statute is quoted, or unless they undertake the detailed and delaying effort of securing a correct copy of the statute. But it takes space to quote statutes. Should the material parts of the statute be quoted for the service of the bar or omitted for the sake of brevity?

It is likewise suggested by some members of the bar that dissenting opinions be not printed. The dissenting opinion usually has its origin in one of two ways. First, it may have been prepared as a proposed opinion, and not being adopted, is filed as a dissent. Second, it may be a memorandum prepared and circulated prior to the consultation at which an opinion is adopted. Many judges, quite properly, decline to dissent unless permitted to state their reasons. To fail to print a dissent places an unfair burden on the judge who honestly fails to agree with his colleagues. Furthermore, a well-reasoned dissent often serves two purposes: First, it tends to prevent a rule of law from becoming "off balance." Second, it may through processes of time and conditions become the majority and established rule. The dissent has a distinct place in the judicial process. Should it be abandoned in the interest of brevity?

It must be admitted frankly that a bit more care, work, thought, and study on the part of the judge would both shorten and improve opinions. It may be conceded that so far as the matters heretofore discussed are concerned, the length and quality of opinions may be materially affected by the appellate courts.

But, if appellate courts corrected these matters, would it remedy the situations against which these charges are directed? I take it that it would not.

The "one-man opinion" is, shall I say, the anathema of our present system. That they are rendered should not be denied. However, they are not the product of the court as often as the bar assumes them to be. They are made necessary solely by the limitations of time and the volume of work. Judges are more anxious than the bar to escape from them. The cooperation of the bar is sought in that effort. Any improvement in the presentation of appeals will be an aid to that much desired end.

Wherein can the bar help the appellate courts do their work more effectively?

The following suggestions are made, not as a preachment, but in the utmost humility and good faith and in an effort to cooperate with the bar in a solution of this problem. It is one that calls for cooperation.

The time to begin in the preparation of a brief in the appellate court is when the facts are being investigated and the original pleadings being prepared. The lawyer who properly prepares his pleadings, briefs his case before trial, marshalls and offers competent relevant evidence, offers carefully drawn instructions and watches his record in the trial court, will find the briefing of his case on appeal to be a relatively easy task and his proportion of successful appeals above the average. The lawyer who first considers the status of his case when he prepares his brief on appeal has often already lost his case, and more often finds himself in great difficulty. The complicated and confused case on appeal (and the complicated or confused and unsatisfactory opinion) is too often the result of lack of preparation and inadequate analysis of the law and the evidence in the trial court. It is recognized that in the running fight of a trial quite often new factual situations develop which present new problems and require new theories and often amended pleadings. These situations cannot be prevented. They can be anticipated in many instances, and the casualties caused by them may be reduced. There should be an "emergency kit" in the trial brief of every law suit. . The preparation of a case for trial is not a responsibility of the courts. That burden rests upon the bar.

Certain of the federal courts have provided by rule for the furnishing on appeal of only that part of the record which is necessary to a decision of the issues presented. To provide for such a procedure in the state courts would require the appellant to analyze his case at the beginning of his appeal and determine the matters which are material to a decision. It would shorten the briefs and eliminate much useless and irrelevant matter. Short records expedite decisions and tend to clarity, exactness, and accuracy. It would reduce the labor involved in examining the record. It would reduce materially the cost of appeal.

Improved briefs will result in improved opinions. Why?

Authoritative briefs, with an adequate treatment of the questions involved, are always welcome. However, "excessively long briefs are likely to result from insufficient study, lack of analysis, and careless writing, and they often give the court very little aid in understanding and deciding the case." (63 ABA Rep., 608.)

It is also to be remembered that it is light and not heat which is helpful to a court.

If the appellant and appellee would agree, so far as possible, on the facts of a case or reduce the question of fact to its essential elements, as sometimes they do by a case stated or by their briefs, the labor and time of a judge expended in studying the record to determine the facts and issues presented could be saved for the essential tasks and deliberation necessary in writing the opinion. The opinions would more ac-

curately (if not concisely) recite the facts and the courts might avoid the charge, "they didn't find out what it was all about." The same result would follow if the lawyers would agree upon and clearly and concisely state the legal issues to be determined. If the lawyers who prepare and try a case and present an appeal cannot determine the factual situation or define the legal issues clearly, is it any wonder that an appellate judge sometimes fails to understand clearly and to state the facts concisely?

When finally worked out, most cases are decided on one or two propositions of fact or law, seldom more than three or four. However, an examination of briefs discloses the constant assignments of error and statements of propositions of law that are either never argued or are disclosed by the briefs to be without substantial merit. Each proposition advanced requires an examination of the record and the law, including all cited cases, often calls for independent research, and quite often an extended discussion in the opinion. The minimum result is a long opinion.

Many briefs contain assignments of error, propositions of law, and cited cases that are not mentioned in the written argument. If an assignment of error is so weak that it cannot be supported by argument, why make it? If a proposition of law is not important enough to mention in the written argument, why place it in the brief? If a case is important enough to cite, is it not important enough to discuss in the argument? If the lawyer eliminates these matters in his own mind when preparing the argument, why place them in the brief?

The "shot gun" method of assigning error and advancing propositions of law quite often results in "shot gun" opinions wherein the court (as the lawyer before it) has not discovered, or has lost sight of the real issues involved. If one of the tests of a good judge is his ability to reduce a case to its essentials, is that not also one of the tests of a good lawyer? If unnecessary labor is taken from the court by the elimination of useless records, immaterial evidence, irrelevant issues, etc., then courts will have more time, *not for recreation,* but for a more complete study of cases. The form and quality of opinions will be improved. That, I take it, is the goal of bench and bar.

Some of the United States Circuit Courts have adopted rules requiring attorneys to set out their assignments of error in the order of their considered importance, and to place in black-face type those considered most important. That rule is followed by a rule that requires that the propositions of law be also so treated, and that the cases considered most controlling be likewise first cited and set out in black-face type. Cases from the jurisdiction of the court should be cited first. Where there is an established rule in one's own court, why cite a mass of decisions from other courts sustaining the same rule? I am advised that these rules in the Federal Courts have resulted in a definite reduction in the number of assignments of error made, propositions advanced, and cases cited, and that the result has been a distinct improvement in the quality of the briefs and arguments. The system might be adopted to advantage by the bar even in courts that do not require that it be followed.

The lawyer should in his brief state, in clear concise language, the principles of law which he believes his authorities sustain, and follow that with his quotations and citations; and not merely give the court quotations and citations, leaving it to the judge who writes the opinion to evolve the rule or principle from the lawyer's too frequently uncorrelated authorities.

The oral argument is most important. In it the average lawyer reduces his statement of facts to a simple narrative, discusses what he considers the major assignments of error, and refers to a few decisions and concludes his case. In it the lawyer reorganizes his case in its most forceful and important aspects. The oral argument might with profit be prepared before the brief is printed. If the lawyer did that he might at that time discover how to improve his brief by the elimination of those matters which it occurs to him are of not enough importance to mention orally.

It has been seriously suggested that the appellant and appellee attach to their briefs proposed opinions which could be adopted by the court. Serious objections are made to the proposal. The lawyer is an advocate. His duty to his client requires that he urge the adoption of one theory of fact and law. He should not be required to change his status of an advocate to that of a judge. The positions are essentially dissimilar.

However, the proposal, if followed, might result to the advantage of the litigant. If the advocate were to attempt the writing of an opinion before his brief is prepared finally, he would be required to analyze his case, determine what facts were important, what issues must be decided, and their relative importance. He would weigh his facts and authorities, all as the appellate court must do. He might then see the advisability of eliminating much material from his briefs. The result would be briefs more in point, with less irrelevant and surplus contentions and materials. The writing of a proposed opinion by the lawyer for his own assistance could be of distinct advantage to the advocate, to his client, and to the court.

The bar objects to "pure dicta" in opinions. The courts likewise object to dicta, "pure" or otherwise. Sometimes dicta is in an opinion because a judge becomes enamored of the subject under discussion, desires to give a complete exposition of the subject, to demonstrate his store of legal learning, and to make the opinion a monument to his judicial ability. Such opinions are not to be encouraged or defended. More often dicta occurs in an opinion because of an effort of a court to answer all contentions of an appellant or appellee. Propositions discussed and vigorously urged upon a court by both parties are often decided and then later it is discovered that the question determined was not in issue. Admitting the responsibility of judges in the matter, cannot the bar help by not incorporating questions in their appeals that are not necessary to a decision? Does comity require that the queries of lawyers be answered where not material to a decision? If the courts should not answer them, then the question comes, should the questions be asked? Are the courts alone to blame when the answers are given?

I have frankly conceded to you that a bit more mental sweat on the part of judges would improve opinions. May I not just as frankly state that a bit more care, work, thought, and study on the part of the advocate in the trial and preparation of briefs on appeal would be of material assistance to the courts in their efforts to improve the quality of their opinions?

If the suggestions herein made were followed both by bench and bar, it would go a long way to shorten opinions, eliminate delay in appellate courts, remove dicta, provide the additional time that could be used to avoid the evil of one-man opinions, and improve the standard of judicial decisions.

WANTED: A THEORY OF THE LEGAL PROFESSION

By Walter T. Fisher*
of the Chicago Bar

THE professions of Law and Medicine are alike faced with re-examination and readjustment of their relations to the public at large. Undeniably, a good many people have not been obtaining medical service. Rightly or wrongly, and in spite of devotion to their own doctors, a sizable part of the public feels that the medical profession has not been delivering the goods. Lawyers are more accustomed to brickbats than are doctors, but they have not been subjected to this particular kind of fire. Nevertheless, it leads lawyers to inquire anew whether *they* have been delivering the goods; and whether they may not be able to forestall the type of attack to which the medical profession has been subjected.

Efforts have been, and are, being made by the organized part of both professions to meet and remedy the situation so presented. Concrete remedial measures in which lawyers have been thus engaged would be aided and strengthened if we had a clearer idea of just what the goods are which the lawyers are supposed to deliver. What is the correct modern theory of the scope of lawyers' services?

There are fewer doctors than lawyers in the United States, yet the average man knows much better what doctors are for. Most members of the general public, even those of considerable intelligence, do not think of using a lawyer unless, as Judge Charles E. Clark said, "there has been an accident of some severity, or an important contract broken, or a personal feud making a man very hot under the collar. . . . The usual notion of a lawyer is still of a surgeon, called in for serious operations, or of a witch doctor, to harass the enemy."[1]

Not only the average man but the lawyers themselves are hazy about the scope of the profession, i. e., what is lawyers' work in the sense of when ought lawyers' services to be utilized. A lawyer who maintains that complicated contracts with a lot of fine print should not be signed without legal advice will put his own signature on a long railroad ticket or a collateral note at the bank, and file away the fire insurance policy on his home, without reading them or even knowing what provisions they contain. Certainly lawyers do not expect their neighbors to send them every insurance policy, but a lawyer would be hard put to it to furnish a general rule under which his neighbor would know which papers to submit for legal examination.

By "lawyers' work" is meant of course those things which ought to be done by lawyers under the best possible organization of the profession, not those things which happen to be regarded as lawyers' work today. The traditional scope of law practice ought not to be over-emphasized. Like doctors, lawyers are inclined to hold too static a view of their profession and to feel the practice will continue to be carried on in about the same way as heretofore.

Law Practice and "Practice of Law"

Lawyers are not, of course, called in to draw every contract, deed or lease. They believe that they should be called upon oftener than they are (to the client's advantage as well as to their own); and, furthermore, that they would be called oftener if laymen did not engage in "the practice of law." Accordingly, lawyers have been taking steps, by court proceedings and by persuasion and negotiation, to prevent laymen from trespassing on the lawyers' field. These efforts have necessitated the working out of a definition of "the practice of law." So defined, the phrase means those things which can be legally done only by lawyers and are prohibited to laymen.

But this "practice of law" that the courts and the committees on unauthorized practice are concerned with is only part of the practice of most American lawyers. When a lawyer gives family advice he is doing something that is traditionally and properly part of his practice. Yet it is something that no one would dream of restricting to lawyers. As family adviser he is in free competition with the clergyman, the physician and others. When a lawyer handles or invests his client's funds or acts as a business agent, he is doing something entirely prohibited to the French *avocat* but which occupies a large portion of the time of many American practitioners. Here again this sort of work is not limited to lawyers and ought not to be. The problem, therefore, of what should be restricted to lawyers is only a part of the broader problem of what is properly lawyers' work.

Erroneous Conceptions of Law Practice

An example of the static approach to their vocation is the attitude of those lawyers who oppose efforts looking toward more efficient methods of organizing legal practice, basing their opposition on the naive assumption that such methods will reduce the standard or quality of the legal service that is rendered. Such lawyers assume that if legal service is so organized that it costs less, it will be less good; that it will be a perfunctory, inferior service. Their argument sometimes runs as follows: Instead of pulling the average client down to the level of the needy accused who has to have counsel assigned him by the court, the needy client ought to be raised to the level of those who are well off. The argument rests upon the assumption that good

*Chairman, Chicago Bar Association Committee on Economics of the Legal Profession. In charge of operation of "Lawyer Reference Plan," for Chicago Bar Association. As to that Plan see A.B.A. Journal, March, 1940.

1. Clark, C. E. (then Dean of the Yale School of Law) and Corstvet, E. The Lawyer and the Public: An A.A.L.S. Survey. 47 Yale L.J. 1272, 1277 (1938).

legal service will only be rendered by the kind of law office and the method of its operation with which we are now familiar. It assumes that law offices and their methods will remain unchanged. It is a little as if our grandfather had said that in order to make transportation available to everyone, we ought not to put everyone on the dead level of an old horse and a battered buggy but should strive to provide every family with a new carriage and pair. That point of view neither envisaged nor obtained excellent low-priced automobile transportation for the ordinary man; nor will improved legal service be rendered by the old fashioned methods of existing law offices.

Increase of system and efficiency in law offices, which we hope will come, will undoubtedly be accompanied by greater standardization of lawyers' work. But these things do not mean inferior legal service any more than the automobile has meant inferior transportation. Some people may prefer the horse and buggy, both in the street and in their offices, but their preference for the leisurely or the picturesque cannot be permitted to halt the streamlining of the legal profession, already long delayed. Lawyers are too important to the success of American political and social institutions for the field of their work to be allowed to dwindle.

Many lawyers thoughtlessly assume that a reduction in their charges necessitates a reduction in their earnings. That their earnings might be increased by reducing charges does not occur to them. Some of these lawyers, whose time is not fully or effectively occupied, overlook the analogy between their own situation and that of certain skilled laborers in the building trades, whose high hourly wages increase the cost of building and so reduce the amount of new construction, with the result that their *annual* incomes are low. Efficient service with low bills is a policy we customarily recommend as profitable for businesses and occupations other than that of the law. It has already been found successful by certain lawyers, for example, those who examine municipal bonds. The lowness of the scale of charges for municipal bond opinions—$25 for passing on the simplest and smallest issue—has been accomplished by specialization and system, and is good for both the public and the lawyers.

Another static approach to the practice of law is that of the lawyer who says there is no such thing as an unsatisfied demand for legal service. Such lawyers contend that there is no large amount of legal service which is needed but which remains undone, that anyone can get a lawyer, that legal service is available to all.[2] This point of view takes account only of *active* demand. It ignores *potential* demand. Demand for legal service, like demand for a product of commerce, as indicated above, depends partly on its price. If you feel that lawyers' fees are about right and will never be reduced, you will naturally give no weight to the likelihood that the effective demand for legal service will be increased by lower charges. Another factor likely to increase demand for legal service, like demand for other things, is improved quality. Speedier, sounder and more effective action, which better educated lawyers will be able to produce in better organized law offices and in courts of higher quality, will make for greater demand for legal service. It is also reasonable to suppose that the demand for legal service will be increased by appropriate methods of letting the public know both when it is advantageous to consult a lawyer and how to find a lawyer appropriate for the task at hand. "The demand for electricity was developed by making a steadily improving product readily available to everyone at a constantly declining price. That is the way to ascertain the need. The electric companies have prospered by this method and we believe the lawyers will too. The important thing is to give the public better service."[3]

Lawyer's Field in Change

The proper scope of the profession is, of course, the things which a lawyer can do best. These cannot be decided *a priori*. They will necessarily be worked out in the hurly-burly of events. The solution will be a constantly changing one, mainly depending on how well the lawyer does each job compared with competing agencies. As part of this process, unauthorized practice rules will, from time to time, inevitably be modified.

A good illustration of the process in operation is what has happened to the examination of real estate titles, something that used to be regarded as essentially lawyers' work. In Chicago, as in other large cities, although the work is now done by lawyers, they are employed either by a business corporation paying dividends to the stockholders who control it, or by a governmental bureau. Actually the public deals with a title company or the Torrens office. The work, on the whole, is satisfactory to the public and most lawyers will agree that it is better done than by individual lawyers examining an occasional abstract. In Chicago the question has been settled that the public is better served by taking this work away from the practicing lawyer. In Boston, on the other hand, the examination of titles remains in the hands of lawyers; not, however, in the hands of general practitioners. There the lawyers have retained the business by means of offices which specialize in the examination of titles and thus are able to render efficient service, even though they do not offer the advantage of title insurance.

Experiment and Research Valuable

In view of the nature of the problem of what lawyers can do best, it seems likely that the most fruitful contribution which lawyers can make toward its solution is by experimentation. By this is meant putting new methods into operation; not only improvements in the administration of justice as conducted in courts, but also as conducted in law offices. Actual experiments in new methods of organizing law practice (such as the lawyer reference services in Los Angeles and Chicago, and the "neighborhood" law offices in Philadelphia) are likely to teach us more than statistics and theoretical discussion.

Statistics and bar surveys, however, have their place and are greatly needed. The valuable report published in 1938 by the American Bar Association Special Com-

2. Cf. Wisconsin State Bar Assn., Report of Committee on Unauthorized Practice, June 1940, referred to in 26 A.B.A. Jour. 554; Meriweather, R. H., Legal Service Clinics 19 Mich. State Bar Jour. 107 (1940).

3. Chicago Bar Assn., Report of Com. on Economics of the Legal Profession, 21 Chicago Bar Record 406, 446 (1940).

mittee on the Economic Condition of the Bar,[4] while comprehensively summarizing the statistics and surveys then available, shows how meagre is our information on the economics of the legal profession. That information has not been since greatly increased. The Public Affairs Committee, incorporated, whose purpose is "to make available in summary and inexpensive form the results of research on economic and social problems",[5] has published three pamphlets on medical economics, but has published nothing on the economics of the legal profession. The reason doubtless is that sufficient investigation has not been made and reported.

Theory also Needed

While the boundaries of the legal profession cannot be successfully fixed in advance but must be chipped out in the manner of the common law, we do need a working hypothesis. Along with more information and more experimentation we need more theorizing, speculation and philosophizing. Theory and philosophy ought always to go hand in hand with research and experimentation. They have not been divorced from the working out of Anglo-American law. Philosophy of law is alive these days, but not every branch of it. The philosophy of the legal profession needs a pulmotor. Plenty of attention has in the past been paid to the important duties of the lawyer toward client, court and community, but little to the lawyer as a man who works for his living. While there is an enormous literature on unauthorized practice, but little of it is concerned with fundamental principles. We need a basic theory of the legal profession which takes account of the economic aspect. Not only in courtrooms but also in law offices is the law in action. The lawyer's economic role is inextricably related to his other functions. For example, if the independent practitioner has no economic role to play, we must look elsewhere for the lawyers who in every generation have been "the remonstrants, the protestants, and the active defenders of individual right"[6] and civil liberties. The task is to relate the economic aspect of the profession to its other aspects. In struggling with the problem of what is lawyers' work, the researchers and the experimenters and also the lawyers, judges, legislators and laymen who are faced with the necessity of making practical decisions are in urgent need of a sound theory of the legal profession.

If we do not develop a sound theory of what lawyers should do, we will get some other kind of theory. A carefree Yale law professor has recently written a book advancing the old theory that lawyers are worse than unnecessary and should be abolished entirely.[7] The Executive Vice President of the National Association of Real Estate Boards defends the practice of real estate brokers in drafting certain types of contracts on the ground that they have "a full understanding of real estate conditions, and of the business contingencies that are likely to arise" and that a monopoly ought not to be granted to lawyers, who are a "group of men completely external to the business of real estate."[8] That is a theory of the legal profession; it runs far beyond the simple contracts which its author had in mind.

The practicing lawyer, who has always drawn heavily upon the legal scholar, needs his help. We want something else than sensational books and magazine articles. Someone must sit down and work out, in the light of all the information available, including the history of the profession in this and other countries, and in the light of fundamental principles of ethics, psychology, government, economics, and other relevent basic sources, a modern theory of the activities of lawyers.

Suggestions to the Legal Philosopher

It is not my purpose to attempt to outline the content of such theory. I do not know what are the essential problems. To discover them will be the first business of our legal philosopher. He will find, I suspect, that one of them is the much discussed matter of recruitment for the profession and limitations on admission to the bar. I submit for his consideration a few possibilities that have had less attention. One is suggested by an opinion of Mr. Justice Frankfurter that "the determination of utility rates does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment."[9] In that sense, what types of work are lawyers' work? What types of work are of an essentially legal nature in the sense that educated and learned lawyers can perform them at a price which the ordinary man can afford to pay? To what extent should lawyers be protected from the competition of others, and to what extent compelled to prove their effectiveness in open competition? From what tribunals, if any, should they be barred, e.g., small claims courts and draft boards? To what extent should lawyers continue to hang out their shingles and offer their services to all comers as independent self-sustaining economic units, and to what extent should they, like teachers and professional economists, be on a payroll? Naturally, the *form of organization* of legal practice will have a vital bearing on the answer to each question of whether some particular kind of work ought to be entrusted to lawyers, whether to independent lawyers and partnerships or to lawyers employed by corporations or the government. To what extent should lawyers be divided into specialties, such as patent lawyers and trial lawyers? Or be in association with others, such as accountants, investment counsellors or social workers?

All I am sure of is that the profession should be treated as something growing, changing, dynamic, its field not delimited by the confines of the territory now legally protected or actually occupied; that adequate treatment will include not only the tasks the lawyer alone performs, but also the things he does in common with others; and that a new, broad theoretical treatment of the legal profession would be a considerable service to lawyers, and, which is more important, to the public.

4. The Economics of the Legal Profession, Am. Bar Assn., June, 1938.

5. Public Affairs Pamphlets, N. Y., 1936-40.

6. O'Brian, J. L. The Spirit of Remonstrance. 42 Harvard Alumni Bull. 810 (1940).

7. Rodell, Fred. Woe Unto You, Lawyers, N. Y., 1939.

8. Nelson, H. U. Drafting of Real Estate Instruments: The Problem from the Standpoint of the Realtors. 5 Law and Contemporary Problems 57-59 (1938).

9. Concurring opinion in *Driscoll* v. *Edison L. & P. Co.*, 307 U. S. 104, 122.

Leading Articles in Current Legal Periodicals

By Kenneth C. Sears
Professor of Law, University of Chicago

CONSTITUTIONAL HISTORY

The Court, The Corporation, and Conkling, by Andrew C. McLaughlin, in 46 The American Historical Rev. 45. (October, 1940)—The historian is aroused by a statement by Mr. Justice Black in 1938: "Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection. The historical purpose was clearly set forth when first considered by this Court in the Slaughter House Cases. . . ." Mr. Justice Black "pays little respect to what has been termed the conspiracy theory of the Fourteenth Amendment." This theory is a myth. Conkling in his argument before the Supreme Court in the San Mateo case in 1882 indulged in a dramatic performance by reading from the Journal of the Committee which framed the Amendment. The Journal had not then been published and Conkling had been a member of the Committee. Conkling's "handling of the material was not altogether commendable." It is possible that thus Conkling influenced the court's opinion. But Conkling did not rely exclusively "on the conscious intention of the committee to protect corporations." The opinions in the circuit court by Field and Sawyer in the same case had been printed and the Supreme Court was familiar with them. Conkling made use of these opinions and used the cases cited in them. The railroad was represented by an impressive battery of counsel and Sanderson's brief was a noteworthy document. Thus Professor McLaughlin arrives at the conclusion that we should abandon "any assumption that Conkling, by a clever insinuation and the *tour de force* of eloquence, led the court to adopt a strange and startling doctrine and that his speech and his intimation of the committee's purpose were the conclusive reason for the court's pronouncement." Rather "it appears improper to do otherwise than believe that the court was convinced (if it needed convincing) by legal argument."

CONSTITUTIONAL LAW

Sales Promotion by Premiums as a Competitive Practice by John Wolff, in 40 Columbia L. Rev. 1174. (November, 1940)—The Michigan legislature prohibited the gift of any commodity as a premium in the disposition of bakery or petroleum products where the intent was to injure or destroy a competitor. The Michigan Supreme Court held that this statute was unconstitutional. It exceeded the police power. This decision is criticized. Why? It relied on two Maryland cases, since overruled. It refused to follow the Supreme Court of the United States, which sustained legislation in the case of a deferred premium, and later state decisions which have followed that lead. However, it is admitted that an equal number of states have refused to follow the Supreme Court. How may this premium legislation be sustained as not in violation of due process? It is not unreasonable for a legislature to believe that premiums strongly appeal to the human desire to get something for nothing and encourage indiscriminate and unnecessary purchasing. This is sufficiently true of such products as gasoline, the market for which is regarded as inelastic, for even there it should be possible to protect consumers from buying a grade or quality they would not have bought except for the premium. Since there is more than one type of advertising, the right to prohibit premiums does not include the right to prohibit all advertising, including musical entertainment in stores and hotels. Premiums obscure prices and hinder price comparison. Thus premiums offer an escape from price competition. It is legitimate to protect business competitors and not compel them to choose between a loss of trade and the premium system. Price reduction appears not to be a satisfactory weapon against the competition of premium giving. Furthermore, there is evidence that premiums encourage retaliation, for example, by hardware dealers against the grocers. These reasons are reinforced by the fact that fourteen European countries have passed anti-premium statutes in the past two decades.

MILITARY LAW

The Militia Clause of the Constitution, by Frederick Bernays Wiener, in 54 Harvard L. Rev. 181. (December, 1940)—How was it "proved conclusively that a well-regulated militia is impossible of attainment under the militia clause." Despite Washington's experience, at the beginning of our national existence there was faith in citizens-soldiers and belief in "the martial prowess of untrained men led by political generals." Under the Militia Act of 1792 most able-bodied men between 18 and 45 were enrolled and required to equip themselves at their own expense. Except for the early naval battles, our fighting record in the War of 1812 is thoroughly discreditable. But the Constitution was invoked by the New York Militia which refused to cross the Niagara River and battle the British in Canada. To be sure, the Constitution gave Congress the power to "repel invasions." There were other grants of power but the New York Militia kept its eye on the words "repel invasions." Accordingly, the militia was unavailable in the Mexican war. In the Civil War the militia was called to suppress insurrection but under the 1795 Act was available for that purpose for only three months. After 1869 the regular army was reduced to 25,000 men and became a mere Indian police. No agency planned for war and officers remained thirty years in the rank of lieutenant. The Spanish War was an eyeopener and shortly thereafter the team of Roosevelt and Root led the way to an army reorganization act, a general staff, and an organized militia, to be known as the National Guard. The Act of 1908 which attempted to make the National Guard available beyond the territory of the United States was ruled to be unconstitutional. The National Defense Act of 1916 required all members of the National Guard to take a dual oath, to support both the Nation and the particular State, to obey both the President and the particular Governor. This Act also provided that the National Guard could be drafted into the national service and when this was done they "stood discharged from the militia." The Army Reorganization Act of 1920 made changes in existing statutes but the National Guard was not made a part of the army in times of peace. It required the Act of 1933 to do this by making the National Guard a reserve component of the army, to be administered under the army clause of the Constitution. Accordingly, the National Guard has a dual status, and every guardsman is a reservist as well as

a militiaman. The Guard can be ordered into the national service upon the declaration of a national emergency. After the termination of its federal service all of its members and units revert to their National Guard status.

LAW REVISION

Revision of Private Law, by Julius F. Stone, Jr., and George S. Pettee, in 54 Harvard L. Rev. 221. (December, 1940)—What can we do to eliminate the defects and anachronisms in our private law? The Commissioners on Uniform State Laws, judicial and legislative councils, revisers of statutes, code editors, code commissions, legislative reference, research, and bill-drafting bureaus and other institutions have rendered valuable service but the job is not finished. Within the last fifteen years New Jersey, North Carolina, New York, and Louisiana have established law revision commissions. The first two have done little. Louisiana established its commission in 1938 with a very ambitious program. New York's commission has had phenomenal success. But New York has not asked something for nothing; it has paid its commissioners $5,000 per year for about ninety days' work. Its "record justifies every legitimate effort to acquaint the legal profession with these accomplishments, to the end that all states will adopt, as soon as possible, a comparable agency of law reform." Other proposals are: (1) the establishment of a national organization of law revision commissions to develop state organizations, coordinate their work and disseminate information concerning it, and; (2) combine in this law revision commission these tasks: substantive law reform, procedural reform, code editing, statutory revision, bill-drafting, and legislative reference and research. Recently New Jersey and Louisiana have provided for nearly this same combination of functions. A further suggestion is that the law revision commission have the duty of publishing the rules, regulations, and orders of the administrative authorities in the state. "In a word, the law revision commission should function as a state analogue of both the Federal Register and the Code of Federal Regulations."

OPINIONS OF PROFESSIONAL ETHICS COMMITTEE

OPINION No. 206

(Filed November 23, 1940)

Fees—Charges to Registrants Under the Selective Service Act—It is important that the legal rights of those who register shall be fully protected and that no legal right of a registrant shall be lost or impaired by reason of his inability to pay for legal services. For a member of a voluntary group organized to render legal services to registrants to refuse legal services to a registrant because he is unable to pay or to exact a charge therefor from such a registrant would violate the traditions of our profession.

The Committee on National Defense of the American Bar Association states:

> "Under Selective Service Regulation No. 145, there will be an advisory board for registrants in each local draft area (though under very special conditions a few of these will be consolidated) and each such board will consist of three lawyers appointed by the governor with power to add to their number.
>
> "These boards will, as such, be limited to problems relating to the draft, but they will turn up a great many cases of registrants who could not, and should not, pay fees (the typical legal aid case) and who have problems arising under the Civil Relief Act, the social security laws, the right-to-employment statutes, as well as under many familiar legal rules. The Bar cannot neglect this demand and we are formulating as rapidly as possible a suitable plan for organization in every draft area (about 7500) which will probably overlap the advisory boards, but having one rotating member in common or a joint secretary or something of the kind.
>
> "All of this work must, of course, be voluntary . . ."

It inquires whether it would be unethical for members of the second group to charge a fee for such services to registrants who are financially unable to pay for the services.

The opinion of the committee was stated by MR. PHILLIPS, Messrs. Houghton, Miller, Drinker, Brand, and Jackson concurring. Mr. Brown was absent and did not participate.

The young men of our nation who respond to the Selective Service Draft will render a public service of a high order. They will perform a patriotic duty to the end that our national defense shall be insured and our nation kept at peace. It is equally the duty of every other American citizen to contribute in every way possible to the accomplishment of these essential and desirable ends.

It is extremely important that the legal rights of those who register shall be fully protected and that no legal right of a registrant shall be lost or impaired because of his inability to pay for legal services. That the Bar will generously respond to this demand cannot be doubted.

It seems to our committee that for a member of the second group to refuse needed legal services to a registrant unable to pay, or to exact a charge from one unable to pay, would be unthinkable and would violate the traditions of our profession.

OPINION No. 207

(Filed November 23, 1940)

Advertising—Canon No. 27—Lawyers may not properly subscribe $15 to a booklet to contain their biographies, with those of other professional men of their community, where their subscription is a necessary condition of having their names and biographies included in the booklet.

The secretary of the Montana Bar Association advises that two enterprising young residents of Helena propose to publish, for their own profit, a booklet entitled, "One Hundred Professional Men and Women of Helena, Doctors, Dentists, Judges, Lawyers." They

plan to include biographical sketches of such professional people. Each person whose biography is included will receive 15 copies of the booklet, which he may distribute as he chooses. The publishers will also sell the booklets to hotels, newsstands, etc.

The lawyers of Montana had no part in promoting the idea, nor was it inaugurated by any chamber of commerce or similar association. However, no lawyer's name or biography would be included unless he paid $15, for which he would receive 15 copies. The project would not be undertaken unless a substantial number of representative Helena lawyers subscribe to it.

The committee's opinion was stated by MR. DRINKER, Messrs. Phillips, Houghton, Miller, Brand, and Jackson concurring. Mr. Brown was absent and did not participate.

Despite the fact that lawyers were not instrumental in initiating or promoting the publication of the booklet in question, we are of the opinion that it would be unethical and contrary to Canon 27 for them to become subscribers to this pamphlet. The fact that no names were included except those of the subscribers clearly would bring the activity as to the subscribers within the category of advertising forbidden by the Canon.

OPINION No. 208

(Filed November 23, 1940)

Firm Name—Continued use of the name of a deceased member may be permitted by local custom but should not be misleading.

Inquiry is made whether a law firm may show the names of deceased former members on the firm letterhead as members, or otherwise.

The opinion of the committee was stated by MR. MILLER, Messrs. Phillips, Houghton, Drinker, Brand, and Jackson concurring. Mr. Brown was absent and did not participate.

In Opinion 6, this committee ruled that it is proper to continue the use of names of deceased former members of a law firm provided that the use of such names is not misleading and is in accord with local custom. Later Canon 33 was adopted wherein it is provided, "The continued use of the name of a deceased or former partner is or may be permissible by local custom, but care should be taken that no imposition or deception is practiced through this use." After the adoption of this Canon, the same was construed by the committee in Opinion 97. The committee again emphasized that the name of a former member of a law firm should not be used in any manner that would be misleading or deceptive. To comply with this limitation it is not uncommon to show a former member is deceased or has retired from the practice by indicating after his name the date he became and the date he ceased to be a member of the firm.

Subject to the limitations herein referred to, the question submitted is answered in the affirmative.

HERSCHEL WHITFIELD ARANT, a judge of the United States Court of Appeals for the Sixth Circuit, died at his home in Columbus, Ohio, January 14, in the fifty-fourth year of his life.

He was a native of Alabama, a graduate of Yale University, where he received the degrees of Bachelor of Arts, Master of Arts, and Bachelor of Laws.

He practiced law in his native state five years, but his bent of mind drew him toward research and he soon found his place in the leading branch of the profession. At various times he served on the faculties of the Mississippi, Cornell, George Washington, Northwestern, Southern California, and Chicago Universities. At the time of his appointment to the federal bench he was Dean of the College of Law of the Ohio State University. The honorary degree of Doctor of Laws was conferred upon Judge Arant by the University of Alabama and by Tulane University in New Orleans.

During his teaching career he was active in the Association of American Law Schools, having served as a member of the Executive Committee in 1934, Secretary-Treasurer in 1935, 1936 and 1937 and President in 1938. He was a member of the Executive Committee and Secretary-Treasurer of the League of Ohio Law Schools. He was a member and Secretary of the Committee on Professional Ethics and Grievances of the American Bar Association since 1933 and served as Chairman of that Committee until his resignation as such in September, 1940.

He left surviving him his widow, who, prior to her marriage was Charlotte Marguerite Hein of New Haven, Connecticut; three children, Mary Pickett, Frances Elizabeth and Charlotte Marguerite; two sisters, Mrs. Berta A. Burns of Birmingham, Alabama, and Mrs. Frances Arant Wilmer, of Baltimore; and three brothers, Dr. Roscoe Arant of the University of Mississippi, Douglas Arant, of Birmingham, Alabama, and Chelcie A. Arant, of Atlanta, Georgia.

BOOK REVIEWS

DEMOCRACY AND FINANCE, by William O. Douglas. Edited, with an introduction and notes, by James Allen. 1940. New Haven: Yale University Press. Pp. xiv, 301.—This volume is a collection of addresses and public statements of Mr. William O. Douglas as member and chairman of the Securities and Exchange Commission. The addresses cover a wide field: the issuance of securities, investment banking, standards of corporate management, stock exchange practices, utility holding companies, corporate reorganization, "administrative government," and education. Skillful editorial work has been done by Mr. James Allen, who was associated with Mr. Douglas in the S.E.C. The addresses have been arranged and combined according to subject matter, and the arrangement reveals a strikingly integrated pattern and shows the extraordinary scope and detail of Mr. Douglas's interest and competence.

The theme which most frequently recurs in this volume is the theme of Mr. Brandeis in *Other People's Money*. Mr. Douglas' principal concern has been to promote responsibility on the part of business fiduciaries. He has developed in convincing detail the dangers of conflicting loyalties for directors, bankers, accountants, corporate trustees, brokers, protective committees—and lawyers. Here Mr. Douglas struck his hardest blows and used phrases such as "financial termites," "predatory interests," and "cancerous growth." When he spoke on this theme, Mr. Douglas was not the detached scholar but the two-fisted fighter whom the Street came to understand. If the rhetoric is unrestrained, it is perhaps no more so than that of Mr. Justice Stone in his remarks in 1934 on the fiduciary principle and the responsibilities of the bar.[1] It is interesting to remember, also, that the reform proposals which Mr. Douglas supported are in some respects less drastic than those advocated in 1915 by Mr. Max Pam, an eminent member of the Chicago Bar.[2]

Of special interest are the chapters on the administrative process and particularly the emphasis upon administration as education—upon the "round-table technique." Mr. Douglas emphasized that some of the objectives of recent statutes require a transformation in attitude and in patterns of conduct on the part of business and financial leaders. "Until that transformation takes place, administrative control over finance will not have been successful."[3] A "reserve" of efficient, administrative powers is essential, but "intelligent business makes a free exercise of such powers both unnecessary and undesirable."[4]

"The responsibilities of administrative agencies and of business demand statesmanship on both sides. Thus, in the case of stock exchanges, the point where self-determination should cease and direct regulation by government should come in, must usually be determined not by arbitrary action but by neatly balanced judgment and discretion on both sides. The administrative agency plays a singularly important role in that process. It may be the propelling force for action where institutional paralysis of business has set in. Or it may be quietly and unobtrusively performing merely a residual role with its presence felt but not seen. The latter is ideally the role; the former is too frequently the necessity."[5]

These addresses contain some broad hints for the lawyer who is concerned about the future of legal practice. Here are the suggestions made to business men in 1938 that they may achieve better results "without benefit of counsel." "The business man is more and more cognizant of the fact that for effective work on at least the policy phases of these problems the best way of avoiding red tape is not to bring it with him when he catches the train or plane to Washington."[6] Nor has the profession been deaf to these warnings,—witness the "practical attitude" toward administrative law which John Foster Dulles urged upon lawyers in the columns of this JOURNAL a few months after Mr. Douglas had spoken.[7]

Another of Mr. Douglas' reforms of reorganization practice has come to have great importance to the Bar. This is the Chandler Act requirement of an independent trustee charged with a duty to report a reorganization plan. When this requirement was first imposed, it was by no means clear that the independent trustee would assume an active role in the preparation of the plan. It was almost equally likely that the plan would continue to be the result of personal trading between representatives of various classes of security holders with the independent trustee acting as a conciliator. Here, however, there has apparently been a real change in institutional patterns; and, with lawyers frequently appointed as independent trustees, it has been a change which has enabled the Bar to take an increasing share of responsibility for this task of public administration.

To some of these chapters, the writings of Professor Douglas stand as scholarly introductions. To many of them, Mr. Justice Douglas is writing lengthy footnotes. And it is certainly too early to predict where his greatest contribution will be found to have been made.

WILBER G. KATZ.
University of Chicago Law School.

1. The Public Influence of the Bar, 48 Harv. L. Rev. 1, 8-9 (1934).
2. Interlocking Directorates, the Problem and Its Solution, 26 Harv. L. Rev. 467 (1913).
3. P. 250.
4. P. 245.

Time—The Essence of Patent Law, by Joseph V. Meigs. 1940. New York: Baker, Voorhis & Co. Pp. xxxvii, 259.—Some years ago two Patent Examiners were engaged in a discussion of the then deplorable state of the Patent Office classification system. One expressed the hope that with a sufficiently large appropriation the job would be done once for all, so well that it would never have to be repeated. The other said, "No, you can never do that. If you had a perfect classification system you would never have any more patents; that would mean that you would have to provide such a minutely explicit scheme that as each new invention developed, it would fall into the niche already prepared for it. In other words, the classification scheme would anticipate all the new inventions."

The author by his concept of time as the essential basis upon which patent decisions should be classified, has done the profession a real service in setting up a

5. P. 258.
6. P. 264.
7. 25 A. B. A. J. 275 (1939).

mechanism which will actually enable one to give the logical answer to a number of questions on which there are no decided cases. The book is arranged on the thesis that matters of novelty, invention and utility are, for the most part, questions of fact, and what law exists is well defined and supported by plenty of clear-cut cases. The effect of time on these factors is the subject of the book.

The main body of the book initially divided into three parts with the application date and issue date as the two great dividing lines. Within these three divisions the themes of laches, abandonment and estoppel are repeated so that the analogous character of events before filing, during prosecution and after grant are bound together.

The style appeals to the reviewer. There are plenty of quotations from the cases, but the quotations are used for elucidating rather than expounding the law. The reader is not offered a group of quotations from cases and left to gather the law from these. It is noted, too, that citations to numerous recent cases are found, indicating that the manuscript was up-to-date on the date of going to press.

Patent lawyers will find in this book a fresh approach to many problems and it may well be that from it some general lawyers will derive inspiration for reviewing the treatment of other phases of the law.

KEITH MISEGADES.

North Chicago, Illinois.

Public Regulation of Competitive Practices in Business Enterprise, by Myron W. Watkins. 1940. National Industrial Conference Board.—This is the third edition of the book on "Public Regulation of Competitive Practices" first published by the Conference Board in November, 1925, and revised and enlarged in the second edition issued in August, 1929. It supersedes in a very real sense both of the previous editions because of the changes both in the methods of marketing and in the mode of regulation that have taken place in the past ten years.

In outline, the book first states the general problem of control, which problem arises in a large measure from the general proposition stated as follows by the author: "The competitive system involves, it is manifest, the grant of a wide discretion to individuals to enrich themselves by whatever methods they can. But it has long been realized that a wise latitude in the choice of pathways to gain may result in the discovery that there are numerous ways by which one may profit at the expense of others, rather than along with them." This situation has led, in the United States, to a sequence of policies in the regulation both of rivals and of monopolists. The author points out that much of the regulation starting with the Sherman Anti-trust Act in 1890 and continued by the Clayton and Federal Trade Commission Acts really accomplished little more than a formal statement of common law doctrines.

During the past decade a series of significant amendments to the earlier acts have been passed. The author suggests that perhaps the most important of these is the Wheeler-Lea Act, the object of which "was to enable the Commission to suppress deceptive or fraudulent selling methods and advertising in cases where it might not be in a position readily to establish the evidences of injury to trade competitors of the concern using such tactics." The Robinson-Patman Act also introduced significant changes by making the receipt of unlawful price discriminations no less an offense than the granting of them and also by the establishment of certain prima facie tests of discrimination. The Miller-Tydings Act opened a new phase in the controversy of resale price maintenance by permitting minimum price contracts that are legal for intra-state trade to hold in cases of inter-state trade. These acts together with the short-lived N.I.R.A. constitute the principal new developments since the 1929 edition of the Board's study.

The book is full of authoritative and provocative discussion. I refer to three instances by way of illustration. First, in the discussion of the regulation of price policies, the author appears to me to have over-simplified the very complicated situations that are grouped together under the term "base point price systems." The author appears to accept the doctrine that the price of a commodity at any point of consumption should cover full costs and that, therefore, any price structure which permits freight absorption is to be condemned. It seems to me that equally persuasive arguments may be raised in support of the claim that the price in any consuming market must be based on the willingness of consumers to pay and that, therefore, any industry with non-continuous location must result in freight absorption unless individual sellers are to be confined to a strictly limited geographic market area.

Second, the author's discussion of the Trade Practice Conferences is illuminating. He divides the history of such conferences into four distinct stages. The second of these which ran from 1926 to 1931 was thought by many to be highly important and was so reported in the 1929 edition of the Board's study. In looking back over this period the author now appears to feel that many of the rules coming out of the conferences were unnecessary because they dealt with matters embraced under common law and that others were so carelessly drawn or so ambiguous that they served no very useful purpose. In 1931 all of the previously approved conference rules were scrutinized and many of them were drastically revised. This revision dampened the enthusiasm of business men generally for the trade practice conferences and led them to agitate for a more positive program. This was accomplished temporarily in the National Industry Recovery Act of 1933. Following the close of N.R.A. the conferences were resumed slowly. They have resulted, however, in somewhat more positive requirements for labeling and so on, than had ever appeared previously. The author concludes his survey of the trade practice conferences with the comment that until their procedure is freed from the bonds of legal formalism its full usefulness will not be realized.

Third, the author obviously feels that the Federal Trade Commission is too diverse in its field of inquiry and too irresponsible in certain regards to reach its maximum usefulness. He suggests, therefore, that the scope of the Commission's administrative responsibility be limited. The author recommends that the enforcement of the Sherman Anti-trust Act and the prosecution of conspiracies in restraint of trade be placed squarely upon the Department of Justice and that the Commission keep itself free from this field. In other ways also there should be some clarification of the division of responsibility between these two important regulative bodies.

On the whole this is a very excellent review and examination of the developments in the field of public regulation.

ROLAND S. VAILE.

University of Minnesota.

Rufus Isaacs, First Marquess of Reading, by his son, The Marquess of Reading. 1940. New York: G. P. Putnam's Sons.

During the past quarter of a century the three English barristers whom American lawyers have known best and admired most have been the Marquess of Reading (Sir Rufus Isaacs), the Earl of Birkenhead (Sir Frederick Smith), and Viscount Simon (Sir John Simon). Each in his day at the Bar was a leading K.C. Each held not only high political, but high judicial office. Lord Reading was Lord Chief Justice, Lord Birkenhead was Lord Chancellor, and Lord Simon (it requires an effort not to write Sir John Simon) now occupies the Woolsack. More than the average Englishman, each had an understanding of and an affinity for Americans and each, as a guest of the American Bar Association, made numerous friends among its members.

To many, therefore, this volume will have a personal interest. That interest will be enhanced by the glimpses the author gives of Lord Birkenhead and Lord Simon. The lives of the three men were closely interwoven. When Sir Rufus Isaacs was Attorney General, Sir John Simon was his Solicitor General. Isaacs and F. E. Smith, though they belonged in different political camps, were close personal friends. It was Smith who was his counsel in the libel suit which thoroughly vindicated him from any imputation of wrongdoing in the Marconi affair. There was for the two friends equal satisfaction and more pleasure on another occasion. Lord Chancellor Birkenhead presided at the dinner given at the Middle Temple for Lord Reading on the eve of his departure for India as Viceroy. Then it was that he epitomized his friend's career: "Forty-five years ago a lad sailed before the mast from the Port of London. Tomorrow he sails to the sound of thirty-one guns."

It was a great career. The second son of a Jewish fruit merchant, a ship's boy, an unsuccessful stockbroker, became Solicitor General, Attorney General, Lord Chief Justice, Ambassador to the United States, Viceroy of India, and Secretary of State for Foreign Affairs.

That the present volume deals with Lord Reading's youth, his career as a junior, as a "silk," as a law officer and as Lord Chief Justice will not lessen its interest, at least to lawyers.

The heavy commercial causes with which Sir Rufus Isaacs was chiefly concerned have no lasting interest for laymen. For a barrister, however, they constituted the most profitable type of practice and Sir Rufus Isaacs' earnings exceeded that of any of his English contemporaries. During the last years of his active practice "his annual receipt in fees verged upon £30.000."* (p. 214).

Without attempting to popularize these cases the author features their intrinsic interest in a way that will appeal to the lawyer-reader. Of especial interest is Sir Rufus Isaacs' method of advocacy. He initiated a new type of cross-examination.

> "Very quiet, very courteous, rarely raising his voice, he never resorted to browbeating, though he could be severe enough if the need arose. Nor did he ever lose his temper or even give the appearance of being ruffled by a witness, however insolent or obdurate...
>
> "His tactics, all the more formidable for being unfamiliar, were never to bludgeon his man but to lead him gently and politely to destruction. A witness, feeling that this suave and soft-voiced person could not possibly be dangerous, would follow him confidently down the paths he indicated and would only realize when it was too late the pitfalls that awaited him at the end" (p. 129).

A story is told of a plaintiff whom he had cross-examined in this way. The litigant was a loquacious gentleman with an admiration of his own gift of repartee. Encouraged to indulge himself, the witness, as he thought, spent the day trouncing the famous K.C. So satisfied was he with his performance that after court, magnanimous in victory, he sent to Isaacs' chambers a box of fine cigars. The gift was returned and the next day Isaacs obtained a directed verdict on the ground that the plaintiff's own admissions as a witness had destroyed his case.

> "Rufus Isaacs' speeches followed much the same lines as his cross-examination. In contrast to the orotund style of the older generation, he talked as a rule to a jury simply and almost confidentially, rarely essaying flights of rhetoric unless the special circumstances demanded it. This was the method that came most naturally to him, and therefore in his view the most suitable for his purpose: for he always held that, if a man could speak at all, he was well advised to develop his powers by practice rather than resort to teachers of elocution and thereby risk losing the essential ingredients of spontaneity and conviction" (pp. 129, 130).

For those of us who have spent happy hours listening to the trial of cases at the Law Courts, this book has a nostalgic flavor. It depicts a pleasant way of life for a barrister that may never come again.

The glittering prizes that came to Sir Rufus Isaacs at the Bar were the result of character, ability and unremitting toil. Isaacs himself attributed his success to hard work alone. In one of his rare epigrams he laid down the maxim that "the Bar is never a bed of roses. It is either all bed and no roses or all roses and no bed."

WALTER P. ARMSTRONG.

Memphis, Tennessee.

The Essentials of Japanese Constitutional Law, by Shinichi Fujii. 1940. Tokyo: Yuhikaku. Pp. 463.—This is not a book on political science but a devotional exercise. Anything this reviewer may say will seem as relevant to those who share the author's religious faith as a Protestant theologian's criticism of a Roman Catholic treatise on the Papal supremacy.

The author's premise is very simple. The Sun-Goddess, Amaterasu-O-Mikami, founded the Japanese state as a divine state and sent her grandson, Jimmu Tenno, to reign over it. "When Jimmu Tenno is referred to," the author says, "as starting on the expedition for the pacification of the remotest parts of the country, he did not mean to subjugate the people. . . . The Tenno's aim was the carrying out of the heaven-ordained mission, that is, the benevolent looking after of the people in obedience to the divine will." The author points out later that Japan "is a country born out of divine will—a country ruled over and governed by the descendants of the gods. . . . The Tenno (emperor) . . . being a living god descended from the Sun Goddess, administers godlike government."

Near the end of his book Mr. Fujii raises the question, "What is there at the basis of such government that makes it morally valuable, and therefore, noble—

*Sir Frederick Smith's earnings approximated this. *Frederick Edwin, Earl of Birkenhead*, by his son, The Earl of Birkenhead, p. 311.

sublime? The answer," he replies, "is quite simple, that it is all because the Imperial Throne is always succeeded to by a descendant of the ancestor gods—a living god."

One who is free from Mr. Fujii's religious beliefs will find it easy to find fault with some of his history. But the value of the book is that it reminds us that different men have different gods.

New York City. KENNETH B. UMBREIT.

The Law of Public Housing, by William Ebenstein. 1940. Madison: University of Wisconsin Press. Pp. IX, 150.—This small volume is not only a survey of the legal status of public housing, but also incidentally, a persuasive showing of its necessity. City slums have long cried to heaven for action, if not for vengeance—although vengeance there has been in the form of crime, disease, and misery. Little that is effective has been done.

The situation is depicted forcibly in the brief of an *amicus curiae* in the Louisville land case, from which Mr. Ebenstein quotes. We may make this excerpt:

> "Surveys made by the City Planning Commission disclosed an excessive number of tuberculosis cases and other communicable diseases originated there. Crime statistics showed an undue proportion of arrests for crime. The fire hazard was great. Economic waste and social degeneration go hand in hand. . . . None of these situations have been known to cure themselves under private ownership. These 'blighted areas' sink lower and lower with an increasing spread of disease, crime, and low morals. Students of the problem, which exists with striking similarity in all our cities, all agree this menacing problem is a public problem, and will, at the outset at least, have to be met by public action. These properties are usually held in diverse ownerships. One owner cannot with any hope of success tear down his old building and erect a new one in its place, because its value is at once destroyed by its dilapidated neighbors. All of these facts combine to make this a matter of public concern, calling for Governmental action. Until some public agency demonstrates the wisdom of the eradication of these existing conditions and the substitution for them of sanitary well-planned housing with proper light and ventilation and all the essentials of proper living safeguarded, there is no hope of its being done by private initiative or private capital."

Mr. Ebenstein is not much concerned with the details of housing legislation. He directs his attention mainly to the constitutional question, and he examines the cases, both state and federal. As to state legislaton there has been no great difficulty, and what there were have been surmounted. As to federal legislation there has been some anxiety. The Supreme Court has not spoken. Mr. Ebenstein maintains, however, (and with good warrant, it would seem, in the light of decisions on kindred topics), that there can be little doubt that federal legislation will be upheld. Federal spending under the general welfare clause has already taken more hurdles that the Housing Act need anticipate.

Mr. Ebenstein has a short chapter on foreign experience with housing problems. In an appendix he gives the Federal Housing Act and the text of two leading decisions, *New York Authority v. Muller* in the New York Court of Appeals, and *Rutherford v. City of Great Falls* in the Supreme Court of Montana.

ARTHUR M. BROWN.

Boston.

Washington Letter

Seventy-seventh Congress Emerges

A BODY convenes when its members come together. When they already are together that is hardly the the word. It may be possible that the present Congress, the 77th, was overincubated in that record final session of the 76th Congress which extended over a period of 367 days. But even so it is getting away to a very energetic start. A good fight is going over the subject of national defense through the Barkley-McCormack bill, S. 275 and H. R. 1776, they being the same bill introduced in both Houses of Congress. The contest is too hot at this time to predict in any detail what the outcome should be, but it seems likely that a strong measure will result.

Revenue and finances will come in for more than their usual amount of attention. The appropriation and tax bills necessarily will be of unusual size, measured in dollars. There are bills which seek to make permanent improvement in the Government's financial affairs. Representative Treadway, of Massachusetts, by his H. Con. Res. 6, would create a Joint Congressional Committee on Federal Finances, which would have sixteen members. They would report to the Senate and the House and within ninety days on measures designed to coordinate revenues and expenditures, make a full study of the budget for the fiscal year following the present one, and devise proposals for a sound fiscal program covering revenues, expenditures, and the possible extension of the public debt.

An investigation by a three-man Senate Committee would be provided, in Senator Tydings's bill, S. Res. 22, of the relationship between appropriations and expenditures, the amount and character of our annual deficits; and it would attempt to devise a plan for automatically balancing the budget in peace times.

Senatorial Contest

An historic contest appears to be in the making in respect to filling the vacancy in one of the West Virginia United States senatorships caused by the retirement of former Senator M. M. Neely who resigned in order to become Governor, to which office he had been elected. His term as Governor, by West Virginia law, was to commence Monday, January 13, 1941. He worded his resignation as Senator "to become effective at precisely 12 o'clock midnight on January 12, 1941."

The question to be determined is whether the appointee of the outgoing Governor or the appointee of the new Governor is legally entitled to the Senate seat. Both Governors and both appointees are Democrats. The retiring Governor appointed as Senator, Clarence E. Martin, of Martinsburg, President of the American Bar Association 1932-33. The new Governor appointed Dr. Joseph Rosier, President of Fairmont State Teachers' College and a former president of the National Education Association. Governor Homer A. Holt (not related, so it is understood, to former Senator Rush D. Holt of the same State), prior to the time he ceased being Governor, gave Mr. Martin a number of different certificates of appointment in order that their validity might be urged upon several principles.

These appointments of Mr. Martin (Congressional Record January 14, 1941, Vol. 87, No. 7, p. 164) were differently worded in several details but, upon cursory inspection, seem to present three situations: 1. Appointment three days before the new Governor's term of office would begin (upon the then Governor having been advised of Mr. Neely's resignation from his senatorial position); 2. Appointment two days before the new Governor's term would begin (upon actual receipt by the then Governor of Mr. Neely's senatorial resignation); and 3. Appointment "the first moment of this 13th day of January, A. D. 1941," which is understood really to have occurred at the exact beginning of the day, Monday, January 13th, according to the Naval Observatory time at Charleston.

Only one certificate of appointment appears to have been given Mr. Rosier by Mr. Neely, the new Governor, and that "on the 13th day of January, 1941." (Congressional Record January 14, 1941, Vol. 87, No. 7, pp. 163, 164.) It is reported that, prior to his formal inauguration as Governor at noon on Monday the 13th of January, Mr. Neely became Governor at a "midnight ceremony at which he was sworn in before a few chosen friends."

Neither of the Senators-designate will be allowed to take the senatorial oath of office until after the Committee on Privileges and Elections has acted in the matter and its action has been approved by the Senate. The credentials of both candidates were presented on the same day and referred to the Committee. Chairman Tom Connally, of Texas, said that "quite a nice question of constitutional law and the privileges of the Senate is involved."

The detailed contentions of both sides should prove extremely interesting. Neither space nor discretion would justify an attempt to review them here. It might seem justified, however, to take a brief look at some of the general aspects of the situation. The usual rule prevails in West Virginia, by a constitutional provision interpreted by the State Supreme Court, to the effect that a Governor holds office until his successor is elected and qualified, that is, has taken the oath of office. Hence the man who was retiring would be Governor until the newly elected official had completed taking the oath, perhaps one or two minutes after midnight.

Upon the occurrence of a vacancy in the office of one of its senatorships, the then "executive authority" of the State was under a direct mandate from the United States Constitution to fill such vacancy. "When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writ of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct." Amendment Seventeen, paragraph 2. Since the Legislature of West Virginia had taken action in conformity with the latter part of paragraph 2, the method of filling the vacancy was by "temporary appointment" rather than by a "writ of election."

Nearly any lawyer, if expressing a curb-stone opinion, might feel very sure that the Senate has authority, specifically given it by the Constitution, to determine this type of contest. It probably does have constitutional authority herein, but the directness of such authority may be open to serious question. The attention naturally falls first upon that section which provides that "Each House shall be the judge of the elections, returns, and qualifications of its own members . . ." Art. I, Sec. 5, cl. 1.

Do either of these three coordinate terms include all the circumstances of a situation where a man is appointed by a Governor to fill a vacancy in the position of a member? By a broad construction, any one of them might be said to include it. But, on the other hand, it might be argued that the normal view of each word would not in-

clude an appointment. "Election" might more definitely seem to include it if a "writ of election" had been in order under the first part of paragraph 2 of the Seventeenth Amendment, instead of a "temporary appointment" because of legislative action by the State in conformity with the Amendment as above referred to. Would authority to judge the "returns" from the State authorities—even if it includes appointment "returns" as well as election "returns"—be sufficient to allow passing on the validity of all the circumstances which resulted in such "returns" being made?

The next point for determination might be whether a legislative body has *inherent* power to pass upon all matters pertaining to rights of a candidate to a seat in that body. Or it might be more nearly correct to say that the Senate has *incidental* power to determine all questions pertaining to the legality of the credentials of those knocking at its doors for admission—including the legality, under State law, of the acts upon which those credentials are based.

Such incidental power could not come within the declared power of clause 18, Sec. 8, Art. I, of the Constitution—i. e., "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof"—because it does not pertain to one of the antecedent powers declared in the preceding 17 clauses of Sec. 8, nor, apparently, to any other power definitely vested by the Constitution. And besides, clause 18 only grants Congress the power "to make all laws which shall be necessary" etc. The matter of determining which of two claimants is entitled to be a Senator can hardly be said to involve the making of a law.

However, the basis of this power, "for carrying into execution" the other powers, extends back of clause 18, that "unfortunate and calumniated provision," to the principle underlying such clause. This broader principle was suggested by Hamilton where he explained that this clause 18 is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers." The Federalist No. XXXIII. There seems little doubt but that the Senate will consider it has the power to determine this entirely novel issue of two candidates claiming appointment to the same Senate seat by reason of their having credentials from two different Governors.

Legislation Proposed

A few of the ends sought by bills already introduced in the new Congress are here observed:

The power to veto separate items in appropriation bills would be granted the President, either by constitutional amendment or by a mere act of Congress, depending upon which method the Judiciary Committee to which the resolution was referred may deem requisite, if S. J. Res. 12 is enacted.

Restriction on the establishment of branch offices by financial institutions chartered or insured under the laws of the United States would be effected by H. R. 118 introduced by Representative Patman, of Texas.

Extension of time already has been granted, for ninety days from January 3rd, for the filing of the report with recommendations by the select House committee which, since May 21, 1940, has been investigating the interstate migration of destitute citizens. This extension was accomplished through H. Res. 16, by Representative Tolan, of California.

Repeal of some of the emergency powers granted the President would result now of enactment of S. 25, by Mr. Taft, of Ohio. The powers are those to fix the weight of the dollar; to issue three billion dollars in greenbacks; and to reduce the weight of the silver dollar.

The Government of the United States would be vested with absolute, complete, and unconditional ownership of the twelve Federal Reserve banks, if H. R. 160, by Mr. Voorhis, of California, is adopted.

A constitutional amendment proposed in H. J. Res. 10, by Mr. Crowther, of New York, would forbid the Federal Government further engaging in business in competition with its citizens; and where already so engaged would require it to liquidate its affairs within five years.

Amendment of the Panama Canal Act is sought in H. R. 169, by Mr. Welch, of California, so as to exempt from tolls certain vessels in the intercoastal trade of the United States. This would apply to vessels suitable for use as naval or military auxiliaries, that is, those capable of a speed of 16.5 knots per hour on full load displacement, and which have accommodations for at least 200 first-class cabin passengers.

Repeal of the Johnson Act is provided in H. R. 1142, by Mr. May, of Kentucky, that is, the Act of April 13, 1934, prohibiting financial transactions with and the making of loans by persons within the jurisdiction of the United States to foreign governments which are in default on their obligations to our Government.

Concentration of Aliens

Preliminary reports show a registration of aliens in continental United States of 4,741,971. Approximately 88 per cent of these are in fourteen States. Each of the other 34 States has less than one per cent of the total. The average percentage for each of the fourteen States is 6.26. Of course, this unequal distribution of the aliens is a little less startling than might first appear, since the fourteen States are, generally speaking, the more populous ones. A more accurate comparison might be had if similar percentages also were given for total population in the two groups of States; but such figures were not furnished in this connection. Of the fourteen States most heavily populated with aliens, New York leads with approximately one million two hundred thirteen thousand; and Rhode Island finishes the list with slightly more than fifty-two thousand. These leading alien registration States in the order of their rank are: New York, California, Pennsylvania, Massachusetts, Illinois, Michigan, New Jersey, Texas, Ohio, Connecticut, Washington, Wisconsin, Minnesota, and Rhode Island.

Registering Organizations

The organizations required to register under the recently adopted Voorhis Act must do so within thirty days from January 15, 1941, the date the Aet took effect. No implications as to the character of an organization should be drawn merely from the fact that it registers, because the Act will operate so as to require registration of organizations whose activities are entirely legal, as well as those which are subversive in character. Failure to register, and other violations of the act are punishable by a fine of not more than $10,000 or by five years imprisonment or both. Officials who subscribe to willful misstatements or omissions in the registration statement are punishable by a fine of not more than $2,000 or by five years imprisonment or both.

The following types of organizations must register: Every organization (a) subject to foreign control which engages in political activity; (b) which engages both in civilian military activity and in political activity; (c) subject to foreign control which engages in civilian military activity; and (d) the purpose or aim of which, or one of the purposes or aims of which, is the establishment, control, conduct, seizure or overthrow of a government or subdivision thereof,

by the use of force, violence, military measures or threats of any one or more of the foregoing. "Political activity" is given a limited definition for the purposes of the Act, that is, to mean any activity "the purpose or aim of which, or one of the purposes or aims of which, is the control by force or overthrow of the government of the United States or a political subdivision thereof or any state or political subdivision thereof."

Administration of the Act is in charge of the Neutrality Laws Unit of the Department of Justice and the Statements are to be filed with that Unit. The Registration Statement contains more than 225 questions designed to elicit the detailed information required by the Act. Among other things, the organizations are required to describe all their advertising, propaganda, and lobbying activities, as well as any participation in labor disputes.

The principal classifications of questions in the Registration Statement may be described as follows: (a) Approximately 60 questions deal with the organization's finances, its source of income, its method of raising funds, its loans, and include identification of all contributors since Jan. 1, 1939; (b) Fifty questions, or thereabouts, deal with the political tie-ups, particularly foreign connections, of the organization and the sources of its policies; (c) About 35 questions are directed toward eliciting the aims, purposes and methods of the organization; (d) More than 20 questions cover the identification of officers of the organization or, if the organization contends that it has no officers, those who are designated to act as officers; (e) A group of questions deals with uniforms, badges, and other insignia worn by members; (f) Another group of questions deals with firearms, including the types of weapons used, manufacturer's number of each, the uses made of them, and where they are kept when not in use; and (g) In addition, each organization must file a copy of every book, pamphlet and other publication issued by it, and each officer of the organization must sign and swear to the Registration Statement.

Justice McReynolds Retires

Voluntary retirement, February 1, 1941, removes from the Supreme Court Justice James Clark McReynolds, appointed, in 1914 at the age of fifty-two years, by President Woodrow Wilson. He had been Attorney General for a year and a half. Previously, under appointment by President Theodore Roosevelt, he had spent four or five years vigorously and ably prosecuting numerous antitrust cases and generally had his views sustained by the Supreme Court. Mr. McReynolds was in the private practice of law for many years at Nashville, Tennessee and practiced in New York City between the times of serving as Assistant Attorney General and of becoming Attorney General at the beginning of President Wilson's administration in 1913. He is reported to have told friends that his ideas of government are those of an oldtime Cleveland Democrat.

Born in Elkton in southwestern Kentucky, educated at Vanderbilt University and University of Virginia law department, and reported to have been a brilliant student, Justice McReynolds developed a great interest in outdoor life, especially duck hunting and golf. He has not been active in the social life of Washington, although a bachelor. Those who know him best consider him a man of great generosity and tenderness, a fine lawyer, a capable and honest justice, tenacious in his opinions but tolerant of others.

The Nation has had the misfortune to have Justice McReynolds pictured, at times, as a dissenter against progressive measures. It may be recalled that he, with former Justices VanDevanter, Sutherland, and Butler had similar constitutional views and that it was usual for them, on such matters, to join both in majority opinions and in dissents, long before the present administration came into power. It is said that Justice McReynolds believes the Constitution was conceived as for a union of States, reserving definite rights to the States. Hence he watched with alarm the trend toward increasing power in the national Government at Washington.

When this vacancy in the active membership of the Supreme Court is filled, President Roosevelt will have appointed six of its members, the three other members senior in point of service being Chief Justice Charles Evans Hughes and Justices Harlan F. Stone and Owen J. Roberts. Recently Justice McReynolds has been the dean of the bench in point of continuous service, having served for approximately twenty-six and one-half years. He is retiring just two days before his seventy-ninth birthday anniversary.

Among the names more often mentioned as a probable successor to the position are: Attorney General Robert H. Jackson; Solicitor General Francis Biddle; Jerome Frank, S. E. C. Chairman; Sherman Minton, of Indiana, ex-Senator and now one of the President's administrative assistants; Justice Harold M. Stephens, of the United States Court of Appeals for the District of Columbia; Thurman W. Arnold, Assistant Attorney General; and Circuit Judge William Denman, of San Francisco.

The Country Lawyer Goes to School

THE Northumberland County Bar Association is the pioneer among the interior country Bars to sponsor a legal institute. In the Fall of 1939 it sold season tickets to the members of its own and neighboring Bars for a course of legal lectures and open forums, to be held in the Court House at Sunbury once a month on a Friday afternoon and evening.

The 1939 lectures were attended by from fifty to seventy-five persons. The attendance at the 1940 Institutes has almost doubled. Lawyers and judges have become interested, talk about the lectures, and look forward to them. Last year several office stenographers reported the lectures for the use of their own offices. This year a Court reporter reports them and transcripts are distributed to the subscribers to the lectures.

The 1940 Institute opened in September with a lecture by Professor Austin W. Scott of Harvard Law School, on "Modern Problems in the Law of Trusts." In October, Professor Laurence H. Eldredge of the University of Pennsylvania Law School and Editor of the Pennsylvania Bar Association Quarterly, gave a most instructive and interesting lecture on "Negligence—What Is It?" and "Absolute Liability in Tort Law." Professor Scott was Reporter for The American Law Institute's Restatement of the Law of Trusts and Professor Eldredge has been an Adviser on Torts to The American Law Institute since 1932. Each of them, about ten days prior to their respective lectures, furnished the local committee with an outline of his subject, together with Pennsylvania citations. This was mimeographed and mailed to the purchasers of tickets a week before the scheduled lecture, thereby giving the lawyers an opportunity to familiarize themselves with the subject in advance.

In November, Philip W. Amram again lectured on "The New Rules of Civil Procedure." In December, M. Clyde Sheaffer, of the Pennsylvania Department of Revenue, discussed "Corporation Taxes in Pennsylvania," and on the same day William A. Skinner, of Scranton, discussed "Workmen's Compensation."

January 17, 1941, was a high spot in this Country Lawyers' Institute: On that date Emeritus Professor Samuel Williston of Harvard Law School, America's leading authority on the law of Contracts, lectured on his chosen subject in the Court House at Sunbury.

JUNIOR BAR NOTES

by James P. Economos
Secretary of the Junior Bar Conference

NATIONAL Chairman, Lewis F. Powell, Jr., Richmond, Va., was the principal speaker at the Regional Meeting of the members of the official family of the Junior Bar Conference in the First and Second Circuits held in Boston on Wednesday, January 15. Leslie P. Hemry, Boston, and H. Graham Morison, Jr., New York City, Council Members for the First and Second Circuits, assisted him in outlining the work of the Conference for the coming year. Genuine enthusiasm was shown by those attending, and a substantial increase in interest is expected from these circuits.

On January 14, while enroute to the meeting, Chairman Powell met in Washington, D. C., with Paul Hannah, Public Information National Director, and Council Advisor, Fred Ballard, to discuss the work of the program. At noon of the same day, he conferred in Baltimore with the Maryland leaders of the Junior Bar Conference. He received a report on accomplishments to date and plans for the future. Herbert Myerberg, Maryland State Director of Public Information, advised him that a twelve week radio program over Station WFBR was receiving favorable reaction. The series is entitled: "Democracy Prepares for Defense." Some of the subjects used on the broadcast to date are: "Draft Administration," "Aid to the Draftees From the Bench and Bar," and "Aid to the Draftee Under the Soldier's and Sailor's Relief Act."

The scene of the next two regional meetings shifts to the West Coast. The second regional meeting will be held in Los Angeles on February 20, and a third regional meeting will be held in Portland, Oregon, on February 24. Vice-Chairman, Philip H. Lewis, Topeka, Kans., will be the official representative of the Conference to these meetings.

All National Committees of the Junior Bar Conference have been appointed by Chairman Powell and all members thereof have been advised of their duties. The newly appointed Committee Chairmen are as follows: Activities Committee: Howard Cockrill, Little Rock, Ark.; Committee on In Aid of the Small Litigant: Earl F. Morris, Columbus, O.; Committee in Cooperation With Junior Bar Groups: Philip H. Lewis, Topeka, Kans.; Committee on Legislative Drafting: George F. Kachlein, Jr., Seattle, Wash.; Membership Committee: Willett N. Gorham, Chicago, Ill.; Committee on Relations with Law Students: Ross L. Malone, Jr., Roswell, N. Mex.; and Committee on Restatement of the Law: Mrs. Mildred G. Bryan, Washington, D. C.

The Younger Members Committee of the Chicago Bar Association have decided to actively participate in the Public Information Program of the Conference in Illinois. In addition to this, they are sponsoring a series of lectures on the National Defense Act and allied subjects to be presented to the Members of the Association at an early date. Alvah T. Martin, Chairman, Horace G. Marshall, Vice-Chairman, and Eva Charles, Secretary, are the current officers of this Committee. The Younger Members seminars on Administrative Law, Bankruptcy, Corporation Law, Probate Law, Real Estate, Taxation and Trial Practice organized last summer are still meeting regularly. These groups have been allowed to direct their own work. To date the two forms of approach to any subject are as follows. (1) that of having an outside speaker, and (2) that of assigning a topic to one of the members who prepares and collects materials dealing with that subject, and who is then charged with the duty of leading the discussion.

The Los Angeles Junior Barristers Public Information Program is again conducting its weekly radio broadcast over Station KFAC each Saturday evening from 6:30 to 6:45 P. M. The program is known as: "The Lawyer's Story Book." The men in charge of this activity are: Francis McEntee, Gordon L. Files, and Sidney Wall, all of Los Angeles.

On December 27, the Junior Bar Conference held its annual meeting in Tulsa. Reports were received from John A. Johnson, Oklahoma City, Chairman of the Personal Finance Survey, and Julian B. Fite, Muskogee, State Membership Chairman. Jack Campbell of Drumright and Edna D. Gillespie of Tulsa were elected Vice-Chairman and Secretary of the organization. James D. Fellers, Oklahoma City, Council Member, attended the meeting on behalf of the Conference.

The Kansas Junior Bar Conference will hold its midwinter meeting in Wichita on February 15. The all day program begins with a legal institute. In the evening social activities take over the stage. James D. Fellers, 10th Circuit Council Member and representatives of the Oklahoma, Colorado and New Mexico Junior Bar Conference units will be in attendance. The Kansas Committee on Small Loans has completed its organization for the personal finance survey. Richard Jones, Wichita, Richard Becker, Coffeyville, and William Mills, Emporia, have been appointed by Roetzel Jochems, Chairman, to undertake the survey in their home communities. John Hunt, State Chairman, advises that the Committee on Public Information, has compiled a list of 600 outlets for its program and is prepared to furnish the necessary speakers.

Willett N. Gorham, National Chairman of the Membership Committee has circularized the official family of the Junior Bar Conference for the purpose of securing greater cooperation in the work of his Committee. In view of the fact that most of the membership resistance has been based on the uncertainties arising out of the National Defense Act, it is very important that all members of the Conference again be apprised of the important action taken by the Board of Governors in suspending the dues of all members while in the military service of the United States.

The Section on Younger Members Activities of the Illinois State Bar Association has announced its 1941 Annual Moot Court Competition among the Law School Junior Bar Associations now existing at the University of Chicago, University of Illinois, Northwestern University, DePaul University and Loyola University.

Recommendations for the appointment of local Public Information directors are being received daily by Chairman Powell. It is expected that more than 300 members of the Conference will be active throughout the year in these posts. National Director Paul Hannah has revised the Hand Book annually distributed to these local Public Information directors. This revised Hand Book will be distributed to the new appointees as soon as their acceptances are received.

BAR ASSOCIATION NEWS

Ohio State Bar Association

THE October, 1940, meeting of the Ohio State Bar Association was held in Cincinnati on October 24, 25 and 26, with more than 600 members in attendance.

The first day was devoted chiefly to meetings of the various Sections of the Association. Marvin C. Harrison of Cleveland and J. Louis Kohl of Cincinnati conducted a symposium on "Recent Developments in Trial and Appellate Procedure" before the Judicial Section; Administrator Herschel C. Atkinson, of the Ohio Bureau of Unemployment Compensation, addressed the Insurance Law Section on "Developing Concepts of Unemployment Compensation"; County Auditor George Guckenberger of Cincinnati, Earl P. Schneider of Cleveland and Hugh M. Bennett of Columbus spoke before the Taxation Section on "Appraising Real Property," "The Revenue Act of 1940 and the Excess Profits Tax" and "The First Year with the Ohio Board of Tax Appeals," respectively. The Real Estate Section heard a discussion of the Mechanics' Lien Laws by Chairman Arthur W. Gordon of the State Bar committee on that subject, and Commissioner James A. White of the Ohio Industrial Commission, which administers the State Workmen's Compensation Fund, addressed the members of the Industrial Commission Section.

The semi-annual meeting of the Council of Delegates was held on Thursday evening, October 24. Ellis R. Diehm of Cleveland and Raymond S. Buzzard of East Liverpool discussed the operation of Pre-Trial Procedure in their respective communities; Municipal Judge George R. Platt of Barberton spoke on "Debtor-Trusteeships," and William H. Nieman of Cincinnati explained the plan of "interneships for lawyers" now being conducted in his city.

Friday, October 25, was devoted to addresses, committee reports and general business. Former State Bar President Howard L. Barkdull of Cleveland rendered a report on the American Bar Association convention at Philadelphia. The results of the first State Bar questionnaire on qualifications of candidates for the Supreme Court of Ohio were announced. Senator-Elect Harold H. Burton of Cleveland delivered an address on "Civil Liberties" and Democratic Senatorial Candidate John McSweeney of Wooster spoke on "America Belongs to Us All."

Donald A. Finkbeiner of Toledo was elected president of the Association for the year 1940-1941, and Secretary-Treasurer J. L. W. Henney of Columbus was unanimously re-elected for his twenty-first consecutive term.

Baldwin

BURT J. THOMPSON
Chairman, Section of Bar Organization Activities

Banquet speakers were Governor John W. Bricker and American Bar President Jacob M. Lashly of St. Louis.

The next meeting of the Ohio State Bar Association will be held at the Deshler-Wallick Hotel, Columbus, April 24, 25 and 26, 1941.

J. ROBERT SWARTZ,
Assistant Secretary.

Colorado Bar Association

New Rules of Civil Procedure

ON January 6, 1941 the Colorado Supreme Court adopted new rules of civil procedure which are patterned after the federal rules. The new rules, are promulgated under a statute, sponsored by the Colorado Bar Association, which was passed in 1939.

The plan of the new rules is to number them the same as the corresponding federal rules. Federal Rule 1 thus became Colorado Rule of Procedure Number 1. Where federal rules are inapplicable, like rule 64, these rules are omitted and the number left blank. Where the Colorado rule covers the same subject matter but is substantially different in wording or effect, the rule is proceeded with a letter "C", thus Rule 43, for example, is mainly a Colorado rule and the subdivisions thereof are preceded by a "C" wherever changed.

Rules which are new to the federal rule begin with Number 98 and continue to 119. They deal with place of trial, special actions, seizure of persons or property, real estate, remedial writs and contempt, arbitrations, affidavits, and supreme court proceedings. Special forms of pleadings and writs have been abolished by the new rules, and writ of error procedure has been greatly simplified.

Streamlining Procedure

The enthusiasm which the Colorado Bar Association has shown for streamlining procedure of the Colorado Courts is again shown in a series of bills to be presented to the present session of the legislature. Bills, sponsored by the association and the County Judges Association, will provide for a coordination and simplification of probate statutes.

A special committee of the association, working with a committee of the County Judges Association, has been reviewing the Colorado laws regarding wills and estates, and will request the

legislature to make some needed changes in the probate laws. Terminology of this proposed statute has been made to agree with the new rules of civil procedure and certain of the provisions regarding service and publication will refer to the rules for a method of procedure. Hugh D. Henry of Denver is chairman of this committee.

The association is also now engaged in studying methods of removing the selection of the judiciary from political control.

WM. HEDGES ROBINSON, JR.
Secretary.

Inter-American Bar Association

THE Inter-American Bar Association was organized at the close of the Eighth American Scientific Congress at Washington, D. C., on May 16, 1940, when the Constitution was signed by a number of representatives of bar associations in the Pan-American countries. Up to the present time the Constitution has been signed by bar associations from the following countries—Argentina, Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Panama, Peru, United States, Venezuela.

On the invitation of President Dr. Manuel Fernandez Supervielle, the first Conference of the Association will be held in Havana during the week beginning March 24, 1941.

The subjects to be discussed may include the following topics:

Customs Restrictions in Countries of the Western Hemisphere; Comparative Constitutional Law; Inter-American Institute of Comparative Law and Practicability of Efforts Toward Coordination in Civil and Commercial Laws and in Real Estate and Mortgage Laws; Inter-American Legal Documentation; Protection of Industrial and Intellectual Property in the Americas (Patents, Trade Marks and Copyrights, Trade Names, etc.) and Air Law and Radio and Telecommunication Laws; The Judicial Power; Jurisdiction; Judicial Administration and Procedure; Criminal Law and Procedure; Encouragement and Development of Trade Relations by Commercial Treaties and Trade Agreements; Aid in National Defense by the Organized Bar, in the Several Countries.

Hon. Jacob M. Lashly, President of the American Bar Association, has consented to address the Conference, probably on the second day, Tuesday, March 25.

Florida Institute for Lawyers

THE December, 1940 issue of the Florida Law Journal, which is recently at hand, announced an "Institute for Attorneys-At-Law" to be held December 6-7 at the Law School of Stetson University, DeLand, Florida. The Institute was sponsored by the Florida State Bar Association, of which J. Velma Keen is President; College of Law, University of Florida, of which Harry R. Trusler is Dean; College of Law, Stetson University, of which Paul E. Raymond is Dean; School of Law, University of Miami, of which R. A. Rasco is Dean. The topics particularly discussed were *Negligence, Workmen's Compensation, Divorce,* and *Tax Problems.* We are advised that the Institute was an outstanding success, and that about 150 lawyers from all over the state attended.

The officers of the Florida State Bar Association for 1940-41 are: President, J. Velma Keen, Tallahassee; Executive Councilmen, Warren Jones, Jacksonville, James Whitehurst, Brooksville, E. Dixie Beggs, Pensacola, Ed R. Bentley, Lakeland, D. H. Redfearn, Miami, J. Lance Lazonby, Gainesville; Secretary-Treasurer, John Dickinson.

Kay-Hart, N. Y.

RAYMOND G. YOUNG
President, Nebraska State Bar Association

Nebraska State Bar Association

THE Forty-first Annual Meeting of the Nebraska State Bar Association was held at the Hotel Fontenelle in Omaha, Nebraska, on December 27th and 28th, 1940 with more than seven-hundred-and-fifty members in attendance.

On the afternoon preceding the formal opening of the convention meetings were held by the County Attorney's Association, the County Judge's Association, the Judicial Council, the Junior Bar Section and the Section on Law Office Management. On the evening of December 26th, President E. B. Chappell entertained at dinner for officers of the Association and all past presidents.

The morning session of December 27th featured the annual address of the President and reports of standing committees. Luncheons were held by alumni of the University of Nebraska, College of Law; Creighton University, School of Law; University of Michigan and Omaha University.

Mr. Jacob M. Lashly, President of the American Bar Association, addressed the afternoon session, speaking on "The American Bar Association—It's Opportunity." Following the address of President Lashly the balance of the afternoon program was conducted by Mr. Laurens Williams, Chairman of the Section on Insurance Law, who presented Mr. Royce G. Row, of Chicago, whose topic was "Automobile Liability Insurance—A Discussion of the Rights and Responsibilities of the Assured, the

Operator, Third Persons and the Company and of Legal and Practical Problems Frequently Met by the Practicing Lawyer." This was followed by Mr. Ralph H. Kastner, Esq., of Chicago, Illinois, Associate Counsel of the American Life Convention, who spoke on "Legal Problems Which Frequently Arise in Life Insurance Litigation."

More than three-hundred attended the Annual Dinner which was held Friday evening in the Main Ball Room of the Hotel Fontenelle. Guest speaker at the dinner was the Honorable Mr. Justice J. Keiller MacKay, D.S.O., of Toronto, Ontario, Justice of the Court of Appeals of Ontario. Justice MacKay spoke on the subject, "Where Our Paths Converge," and proved to be one of the most popular speakers ever to appear on the program of an Annual Meeting.

Section meetings occupied all of the forenoon of the twenty-eighth. The Sections and the programs were as follows:

Real Estate Law Section—Dean H. H. Foster, Chairman.

Report of Standardization Committee—R. O. Williams, Lincoln.

Report of Committee on Curative Acts—Thomas J. Keenan, Geneva.

Report of Committee on Improvement of Substantive Law of Real Property of Nebraska—Barton H. Kuhns, Omaha.

"The Most Needed Reforms in the Probate Law of Nebraska"—Judge Fred T. Hanson, McCook.

Section of Administrative and Labor Law—W. M. McFarland, Chairman.

"Appeals of Unemployment Compensation Benefit Claims"—John E. Sidner, General Counsel, Nebraska Unemployment Compensation Division.

"The Collective Bargaining Agreement"—Roy M. Brewer, President, Nebraska State Federation of Labor.

"Practical Operation Under Wage and Hour Law"—W. F. Scherer, Senior Attorney, Region XIII, Wage and Hour Division of the U. S. Department of Labor, Denver, Colorado.

Municipal Law Section—Varro Tyler, Chairman.

"The Power of Municipalities to Acquire Utilities Properties Beyond Their Boundaries"—Arthur R. Wells, Omaha.

"A Municipal Legislative Program"—H. F. Mattoon, Beatrice.

Noon luncheon meetings were held by alumni of Phi Delta Phi, Phi Alpha Delta, Delta Theta Phi; the District Judges Association and an organization meeting was held by a group of unaffiliated lawyers.

Speakers at the Saturday afternoon session were Chief Justice Robert G. Simmons, of the Supreme Court of Nebraska, and Judge John J. Parker, Charlotte, North Carolina, Judge of the United States Circuit Court of Appeals.

Outstanding among committee reports submitted was that of the Special Committee on Corporate Revision. The committee presented a completely revised Act on Corporation Law, which was approved and which, together with eight Uniform Acts and a bill for revision of Statutes comprises the legislative program of the Association for 1941. Bills covering all of the above have been drafted and presented to the Nebraska Legislature, which is now in session.

Officers for 1941 are:

President—Raymond G. Young, Omaha.

Vice-presidents—B. F. Butler, Cambridge; James L. Kinsinger, Lincoln; Seymour L. Smith, Omaha.

Secretary and Treasurer—George H. Turner, Lincoln.

GEORGE H. TURNER, Secretary.